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93-353 No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FELTON HALE and RICHARD S. BERRY,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.
and
JOHN LEROY FULLER, *et al.*,
Petitioners,
v.
STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 1, 1993

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QUESTION PRESENTED

Whether state inmates who work in correctional industries programs producing goods and services for interstate commerce are excluded from the coverage of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) and are therefore not entitled to payment of the federal minimum wage.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

A) Plaintiff and petitioner in the first case is Richard S. Berry. The defendants and respondents are the State of Arizona, ARCOR Enterprises (ARCOR), a subdivision of the State of Arizona, Arizona Correctional Industries (ACI), a subdivision of the State, and statutory successor to ARCOR, James Ricketts, former Director of the Arizona Department of Corrections (DOC), Samuel Lewis, Director of the DOC, Marilyn Wilkens, Director of ACI, Thomas Lescault, Director of ARCOR, Tony West, David Tierney, Earl Cobb, Thomas Donnelly, Henry Evans, Marcus Englemen, Delbert Householder, and Ray Shaffer, members, board of directors, ARCOR.

B) The plaintiffs and petitioners in the second case are John Leroy Fuller and 296 other inmates whose suits were consolidated by the trial court with the *Fuller* suit.* The defendants and respondents in the second case are the same defendants listed for the *Hale* case, and the following additional persons: Richard Orberg, Kenneth Van De Veer, John F. Wright, James Kinsella, Gilbert Evans, Ralph Cluff, Michael Ullery, all of whom are or were non-inmate employees of ARCOR or ACI.

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* A complete list of these 296 consolidated plaintiffs is provided at Pet. App. 107a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Bonnette v. *California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) 7

Carter v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984) 10

Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 14

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 6

Goldberg v. *Whitaker House Coop., Inc.*, 366 U.S. 28 (1961) 7, 16

Harker v. *State Use Indus.*, 990 F.2d 131 (4th Cir. 1993), *petition for cert. filed*, July 19, 1993 (No. 93-5298) 12, 13

Miller v. *Dukakis*, 961 F.2d 7 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992) 11

Powell v. *United States Cartridge Co.*, 339 U.S. 497 (1950) 16, 18

Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 16

Vanskike v. *Peters*, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993) 11, 12

Watson v. *Graves*, 909 F.2d 1549 (5th Cir. 1990) .. 10, 11

STATUTES

Ashurst-Sumners Act, 18 U.S.C. § 1761 ..... 8, 15

18 U.S.C. § 1761(c)(2) 18

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ..*passim*

29 U.S.C. § 203 2

29 U.S.C. § 206 2

29 U.S.C. § 216(b) 18

29 U.S.C. § 216(c) 18

42 U.S.C. § 1983 .....*passim*

MISCELLANEOUS

Work in American Prisons: The Private Sector Gets Involved, U.S. Dep't of Justice, Nat'l Inst. of Justice (May 1988) 17, 19

TABLE OF AUTHORITIES—Continued

	Page
The Private Sector and Prison Industries, U.S. Dep't of Justice, Nat'l Inst. of Justice (August 1985)	19
Ariz. Laws 1978, chap. 164, § 29	4
Ariz. Rev. Stat. § 31-251(A)	3
§ 31-254(E)	4
Ariz. Rev. Stat. § 41-1621 *et seq.*	3
§ 41-1622	3
§ 41-1624.01(B)	3
§ 41-1628	3, 4, 5

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard S. Berry, John Leroy Fuller, and their co-appellants below hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (Pet. App., *infra*, 1a) is reported at 993 F.2d 1387 (9th Cir. 1993). The initial panel opinion (Pet. App. 41a) is reported at 967 F.2d 1356 (9th Cir. 1992). The opinion

and judgment of the district court in *Fuller* v. *State of Arizona* (Pet. App. 71a) and the opinion and judgment of the district court in *Hale* v. *State of Arizona* (Pet. App. 89a) are unreported.

JURISDICTION

The *en banc* opinion of the court of appeals was entered May 4, 1993. Pet. App. 1a. The time within which to file a petition for a writ of certiorari was extended by Justice O'Connor until September 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3 of the Fair Labor Standards Act provides in relevant part:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203.

Section 6 of the Fair Labor Standards Act provides in relevant part:

> (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following [prescribed minimum] rates . . .

29 U.S.C. § 206.

STATEMENT

1. Petitioners are a group of inmates in Arizona correctional facilities who seek to recover the federal minimum wage for work performed in state prison industries programs that produce goods and provide services in interstate commerce. Under Arizona's penal system, all inmates are obliged to work 40 hours a week at "hard labor." Ariz. Rev. Stat. § 31-251(A). This work can be done in a correctional industries program if the inmate elects to work in that program and is approved by the prison. Inmates can also work in a menial capacity (called, in Arizona, the WIPP program) for $.08/hour sweeping dining halls, cutting the grass, and performing similar purely intra-prison tasks.

None of the petitioners seek compensation for any work performed in the WIPP program, which does not produce goods or provide services that enter interstate commerce. Rather, petitioners all work or worked for Arizona Correctional Industries, or ARCOR.[1] The ARCOR program, which is divided into several "enterprises" and is run by the Arizona Department of Corrections ("DOC"), is a statutorily created prison program (Ariz. Rev. Stat. § 41-1621 *et seq.*), able to purchase raw materials "for use in the manufacture of products for sale." *Id.*, § 41-1622, as amended 1984. State law authorizes the DOC to enter into contracts (*Id.*, § 41-1624.01(B)), to promote ARCOR goods and products "consistent with sound marketing principles" (*Id.*, § 41-1628), and otherwise to do everything that a privately-run business can do.

In order to get an available ARCOR position, inmates must (a) apply to the prison for the position; (b) be acceptable to the prospective department or division of ARCOR to which they are applying (*i.e.*, have

[1] In 1987, the legislature changed the name of ARCOR to Arizona Correctional Industries (ACI). As the courts below did, this petition uses the older name of "ARCOR."

the requisite skills); and (c) achieve certain institutional classification clearances with respect to security and other penological matters. Ten to twenty percent of the state's prisoners work for ARCOR enterprises producing goods (such as clothing, fabricated steel, livestock, and dairy products) and providing services (such as hotel reservation services for Best Western motels) in interstate commerce. Pet. App. at 5a.

One of ARCOR's goals is to enable inmates working in these programs to make money selling products to allow "restitution to victims," "provide assistance to their dependents, thus tending to strengthen family ties," and to "accumulate savings for . . . eventual return to the community." Arizona Laws 1978, chap. 164, § 29. That goal complements state law, which provides that all wages an inmate receives in excess of $.50 cents per hour must be used for victim restitution, reimbursement of the state for room and board, and payment of child support and for the support of other dependents. Ariz. Rev. Stat. § 31-254(E).

a. Petitioner Richard Berry was an Arizona inmate who worked from early September, 1984, through May, 1985 in ARCOR's Inmate-Owned Business Enterprise program (IOBE). Under this program, selected inmates can organize and operate businesses and sell goods "to the public" under ARCOR supervision. *Id.*, § 41-1628, as amended 1978. Petitioner Berry was employed as the shipping and receiving clerk and office manager of "C A Buckles," an IOBE business owned by another inmate.

C A Buckles manufactured and sold custom designed rodeo and "logo" western-style belt buckles and jewelry. It was listed in several telephone books in the three largest Arizona metropolitan areas and had three direct telephone lines to the outside world. Its customers, both on a one-time and repeat basis, included the U.S. Marine Corps at El Toro, California; Mountain Bell Telephone

Company in Phoenix, Arizona; Speed-O-Fam in London, England; U-Haul International in Tempe, Arizona and Las Vegas, Nevada; Butler Buildings in Kansas; a California movie company; numerous Jaycee chapters in the State of Arizona and elsewhere; and many annual rodeos held both within and outside of the state. C/A Buckles also sold its wares to other retailers within and outside of Arizona, and advertised its products in a catalog that was mailed throughout the country.[2]

Berry was paid $50.00 a month, a wage approved by a prison and ARCOR classification committee in the course of approving his employment with C/A Buckles. DOC wage payment policy required the buckle shop (and all other IOBE businesses) to pay to ARCOR or the prison, not the inmate worker, all wages due inmate workers. In turn, the prison paid the inmate workers by depositing into the inmate worker's commissary account the monies given it by the operator for the wages.

b. Petitioner John Fuller and the 296 other inmates whose cases were consolidated with his were employed directly by ARCOR in other ARCOR industries. Fuller and his fellow inmates performed agricultural production, made license plates for other states, manufactured wooden toys, and worked in the construction industry in the state outside the prison walls. These products were marketed by an ARCOR non-inmate sales force via a catalog sent throughout the country.

ARCOR submitted bids to prospective buyers and contractors for goods and services. Many products were produced pursuant to long-term supply contracts. For example, Farmer John Meats, a California meat packing and processing firm, bought all stock produced on the ARCOR hog farm.

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[2] ARCOR in general has the power to produce and disseminate a catalog of its goods to make them "accessible to . . . the public." Ariz. Rev. Stat. § 41-1628.

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Like petitioner Berry, Fuller and his fellow inmates had to apply for their jobs, achieve a security clearance, and be assigned by the prison to the correctional industries program at a pre-set wage approved by ARCOR and the prison. Neither Fuller nor any of the other inmates were paid the minimum wage provided for by federal law.

2. Petitioners brought separate suits in the United States District Court for the District of Arizona seeking minimum wages under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201 *et seq.*), Section 1983 (42 U.S.C. § 1983), and Arizona state law. In the *Hale* action, in which petitioner Berry was a plaintiff, the district court granted summary judgment in favor of all defendants on the grounds that (1) there was no employer-employee relationship under the FLSA and (2) the Eleventh Amendment deprived it of jurisdiction over the state and federal claims for money damages. Pet. App. at 71a. A different district court consolidated petitioner Fuller's case with 296 other similar suits (the *Fuller* case) and dismissed for lack of jurisdiction all claims except the § 1983 claim for injunctive relief against state officers. With respect to that claim, the court stayed further proceedings pending appeal of its order of dismissal. Pet. App. at 88a.

The Ninth Circuit consolidated the two appeals.[3] In the initial decision, a panel of the Ninth Circuit concluded that the Eleventh Amendment did not bar petitioners' claims under the FLSA, and that all of the petitioners were employees within the meaning of that Act. The panel found that Congress had expressed its unmistakable intent to override the Eleventh Amendment in a 1985 amendment to the FLSA. That amendment, which was prompted by this Court's determination in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), that states

[3] All of the plaintiffs in the *Fuller* action appealed. Only petitioner Berry appealed the district court's decision in *Hale*.

are not immune from federal regulation of their "traditional state functions," gave states until April 15, 1986 to conform to the Act. Pet. App. at 48a. Accordingly, the panel concluded that the FLSA extended to state employees. *Id.*

Turning to the merits of petitioners' FLSA claims, the panel held that prisoners were not *per se* excluded from the Act's coverage. In so ruling, the panel relied on the "striking breadth" of the Act's definition of "employee" and the fact that prisoners are not included among the Act's extensive list of excepted workers. Pet. App. at 49a-50a. In addition, the panel noted that application of the FLSA to inmates who produce goods and provide services in interstate commerce is consistent with Congress' desire to protect both private businesses and employees from being driven out of work by competing products made by unfairly priced labor. Pet. App. at 50a-51a.

Following this Court's instruction that the existence of an employment relationship under the FLSA must be determined in light of the "economic reality" of the situation (see *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)), the panel applied the four-part "economic reality" test first enunciated in *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). Under that test, courts look at whether the alleged employer (1) had the power to hire and fire, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of compensation, and (4) maintained employment records. Pet. App. at 52a. Examining those factors in the context of the ARCOR programs at issue here, the panel concluded that there was an "employment relationship" between all of the petitioners and the state prison. Pet. App. at 59a-62a.[4]

[4] The panel upheld the dismissal of petitioners' state law claims. It held that all § 1983 claims against the state and the DOC were

The state sought and obtained *en banc* review of the panel's decision. Like the initial panel, the *en banc* court held that the Eleventh Amendment did not bar petitioners' claims under the FLSA and that state prisoners are not *per se* excluded from the coverage of the Act. Pet. App. at 4a, 8a, 12a. Notwithstanding this disavowal of a *per se* rule of exclusion, a majorty of the *en banc* court held that inmates who "worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor[] [are] not 'employees' of the prison." Pet. App. at 17a. Dispensing altogether with the *Bonnete* factors, the court reasoned that "the relationship between prison and prisoner . . . . is penological, not pecuniary." Pet. App. at 15a. It concluded that "the economic reality is that [the prisoners'] labor belonged to the institution," and that petitioners therefore could not be employees within the meaning of the FLSA. Pet. App. at 17a.

Although it acknowledged that "the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition," the majority opined that "nothing in the FLSA indicates that that fact alone should convert the relationship between prison and prisoner to one of employer-employee such that prisoners working on a program structured by the prison are entitled to a minimum wage." Pet. App. at 20a. The majority thought its views in this regard were buttressed by the Ashurst-Sumners Act (18 U.S.C. § 1761), which criminalizes the interstate transportation of prison-made goods unless prevailing wages were paid for their manufacture. According to the majority, the Ashurst-Sumners Act's more specific treatment of prison-made goods renders the FLSA's unfair competition con-

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likewise barred, but that petitioners were entitled to pursue their § 1983 claims for both injunctive relief and damages against the individual defendants and ARCOR.

cerns inapplicable to prison labor. See Pet. App. at 21a-23a.[5]

Two judges dissented. They argued that the plain language of the FLSA covered petitioners and that nothing in its language or structure supported the implication of an exemption that sweeps in all "prison-structured" inmate labor. Pet. App. at 35a-36a. In addition, the dissenters argued that, because petitioners were unquestionably employed in businesses that competed in interstate commerce, the majority's implied exemption was inimical to the FLSA's goal of eliminating unfair competition and the substandard labor conditions tmat such competition fosters. Pet. App. at 31a-32a. Finally, the dissenters noted that the Ashurst-Sumners Act complemented, rather than supplanted, the FLSA, and thus did not limit the reach of the latter. Pet. App. at 37a-38a.

REASONS FOR GRANTING THE PETITION

The issue raised by this petition—whether inmates who work in prison-structured programs and produce goods that are sold in interstate commerce are "employees" within the meaning of the FLSA—has arisen with increasing frequency and produced a confused and contradictory series of decisions in the circuit courts. Indeed, had the *en banc* majority adopted the rationale employed by at least two other courts of appeals, it would have reached an entirely different result. The decision below, moreover, is inconsistent with the interpretation of the FLSA rendered by the Department of Labor, the agency responsible for administering and enforcing the

[5] The majority also ruled that the state, the DOC and ARCOR are not persons within the meaning of § 1983; that the Eleventh Amendment bars petitioners' claims for monetary damages against the individual defendants; and that the district court properly granted summary judgment on petitioner Berry's claim for injunctive relief under § 1983 against the state officials. Neither these rulings, nor the initial panel's ruling with respect to petitioners' state law claims, are at issue in this petition.

Act. The applicability of the Act to prisoners who manufacture goods for interstate commerce is an issue of national significance that affects not only thousands of inmates across the country, but also tens of thousands of workers and businesses in the private sector that compete with prison-made goods.

1. Six circuits have addressed the question that gives rise to this petition. No fewer than three different rationales have emerged from the decisions of these courts. Under one of these rationales, petitioners would have been deemed employees entitled to receive the minimum wage for their work producing goods for interstate commerce.

Both the Second and Fifth Circuits have held that where prisoners produce goods or provide services in interstate commerce, the inmates' employee status must be determined using the four-part "economic reality" test set forth in *Bonnette*. In *Carter* v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), the Second Circuit noted that a central purpose of the FLSA was "the establishment of minimum standards in the workplace" in order to "eliminat[e] . . . unfair competition." *Id.* at 13. Noting that the exemption of an entire class of workers from the coverage of the Act could "upset[] the desired equilibrium in the workplace" (*id.*), the Second Circuit held that "the fact that [someone] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA." *Id.* at 15. It therefore remanded the case with instructions that the district court assess the inmate's employee status under the *Bonnette* test.

Relying extensively on the Second Circuit's reasoning in *Carter*, the Fifth Circuit held that "status as an inmate does not foreclose inquiry into FLSA coverage" and that, "in order to determine the true 'economic reality' of the [i]nmates' employee status, we must apply the four factors of the economic realities test." *Watson* v. *Graves*, 909

F.2d 1549, 1554 (5th Cir. 1990). Like the Second Circuit, the Fifth Circuit noted that "[t]he Act was drafted not only to improve living conditions, bargaining strength vis-a-vis employers, and the general well-being of the American worker, but also *to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs.*" *Id.* (emphasis added). Applying the four-part test, the Fifth Circuit concluded that inmates who had been forced to work for an outside contractor were employees of that contractor as a matter of law. *Id.* at 1556. In addition, in stark contrast to the *en banc* court below, the Fifth Circuit deemed the economic reality test equally applicable to the inmates' claims that they were employees of the prison officials who had compelled them to work, but found that those claims failed for lack of sufficient evidence. *Id.* at 1556-57.

Since the Fifth Circuit's decision in *Watson*, two circuits have concluded that the FLSA does not apply to prisoners who work in prison programs that do not produce goods for sale in interstate commerce. In *Miller* v. *Dukakis*, 961 F.2d 7, 9 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992), the First Circuit held that sexually dangerous persons working at a correctional treatment center were not employees under the Act. The court explained that "payment of sub-minimum wages to [the inmates] presents no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the Treatment Center does not operate in the marketplace and has no business competitors." *Id.*

In *Vanskike* v. *Peters*, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993), the Seventh Circuit concluded that the four-part economic reality test did not apply in the case of a prisoner who was compelled to work in the prison as a "janitor, kitchen worker, gallery worker and 'knit shop piece-line worker.'" *Id.* at 806. Although it agreed with the determinations in *Car-*

ter and *Watson* that prisoners are not categorically excluded from the FLSA's coverage (*Vanskike*, 974 F.2d at 808), the Seventh Circuit concluded that, because the inmates' "allegations reveal that he worked in the prison and for the [Department of Corrections] pursuant to penological work assignments, the economic reality is that he was not an 'employee' under the FLSA." *Id.* at 810. The Seventh Circuit was careful to note, however, that Vanskike had "allege[d] only that he worked for the Department of Corrections, and that his labor was 'forced.'" *Id.* at 808. Because the record disclosed only that Vanskike performed "simple service work" within the prison as a "janitor" and "kitchen worker," the court noted that it was 'not at all clear whether Vanskike works to produce goods that are distributed outside the prison." *Id.* at 811.

In the two most recent decisions, including that of the *en banc* majority below, courts have dispensed with the economic reality test even where the inmates were indisputably engaged in interstate commerce. Notwithstanding the fact that, on its face, the decision in *Vanskike* was limited to work that did not affect interstate commerce, the *en banc* majority below, as well as the Fourth Circuit in *Harker* v. *State Use Industries*, 990 F.2d 131 (4th Cir. 1993), *petition for cert. filed*, July 19, 1993 (No. 93-5298), applied the Seventh Circuit's reasoning to inmates who produce goods that are sold in interstate commerce. The majority below acknowledged that "the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition." Pet. App. at 20a. Nevertheless, it asserted that this fact—which the courts in *Carter*, *Watson* and *Miller* deemed critical—should not "convert the relationship between prison and prisoner to one of employer-employee." Pet. App. at 20a. Instead, like the Fourth Circuit, the majority argued that the Ashurst-Sumners Act, which criminalizes the interstate transportation of prison-made goods that are not produced in certified

prison programs, renders the FLSA's concern with unfair competition inapplicable to prison labor. See Pet. App. at 17a-18a (citing 18 U.S.C. §§ 1761-62); see also *Harker*, 990 F.2d at 134.

The rationale of the majority below and the Fourth Circuit in *Harker* is fundamentally incompatible with that of the Second and Fifth Circuits. Relying on the Ashurst-Sumners Act, the Ninth and Fourth Circuits have dismissed as irrelevant a fact that the Second and Fifth Circuits, as well as the First Circuit in *Miller*, deemed essential to determining the applicability of the FLSA to prison workers—*i.e.*, the impact on competition of goods produced by sub-minimum wage prison labor. Moreover, where the Second and Fifth Circuits have eschewed the use of *per se* rules of exclusion in favor of a case-by-case analysis of whether an inmate is covered by the FLSA, the Ninth and Fourth Circuits have categorically excluded from the Act's coverage all prisoners who are compelled to work in "prison-structured programs." Pet. App. at 14a-16a.[6]

This case, therefore, raises an inter-circuit conflict that the decision in *Vanskike* did not present. The Second and Fifth Circuits have applied the four-part economic reality test only where inmates produce goods or provide services in interstate commerce; because the record in *Vanskike* did not disclose whether this predicate to invocation of the test was satisfied, the Seventh Circuit's refusal to apply the test did not necessarily reflect a departure from the *Carter Watson* analysis. Here, no such evidentiary gap exists. To the contrary, not only did ARCOR products move in interstate commerce, but,

[6] Although the *en banc* majority below stated that it did not hold that the FLSA "categorically excludes all labor of any inmate" (Pet. App. at 10a), it is difficult to imagine how an inmate can work in anything other than a "prison-structured program." For its part, the Fourth Circuit suggested that the FLSA could apply to prison labor only in unspecified "extraordinary circumstances." *Harker*, 990 F.2d at 135.

as the initial panel opinion makes clear, petitioners would have been deemed employees within the meaning of the FLSA had their claims been judged under the economic reality test employed in the Second and Fifth Circuits. See Pet. App. at 15a-16a. The doctrinal conflict, therefore, is squarely presented.

2. Not only does the analysis of the majority below conflict with that of Second and Fifth Circuits, it is inconsistent with the interpretation of the FLSA rendered by the Department of Labor, the agency charged with administering the law. Indeed, in view of the deference owed that agency's reasonable interpretation of the Act (see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)), this conflict alone is sufficient to warrant review by this Court.

Like the Second and Fifth Circuits, the Department of Labor has applied the four-part economic reality test to inmates who manufacture goods for sale in interstate commerce. Letter of Herbert J. Cohen, Deputy Administrator, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (April 16, 1985) at 1-2 (Pet. App. at 101a-102a)[7] (applying the test to inmates who "manufactur[ed] brooms and related items for sale to commercial customers"). The Department has carefully distinguished such situations from those where, as in *Miller* and *Vanskike*, an inmate "does work *for the prison*, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program." Letter of Daniel F. Sweeney, Deputy Assistant Administrator, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (Jan. 21, 1993) at 1 (Pet. App. at 105a) (emphasis added). In the case of such purely intra-prison

[7] Because this letter was obtained through a Freedom of Information Act request, petitioners are able to provide only a redacted copy. The redactions, however, appear to delete only the names of the affected entities.

work, the Department has explained, the FLSA does not apply. *Id.*

As this distinction makes plain, the Department has recognized, like the Second and Fifth Circuits and the dissenters below, that application of the FLSA to prisoners who produce goods for sale in interstate commerce furthers one of the Act's central goals—preventing "an unfair economic or competitive advantage over other employers." Letter of Herbert J. Cohen at 3; Pet. App. at 103a.

The Department of Labor's interpretation ensures that prisoners in different geographic locations will be treated differently until this Court resolves the issue of the proper scope of Section 3 of the FLSA. Some prisons will simply comply with the Department's interpretation while others—primarily those in the Fourth and Ninth Circuits—will rely on the law in their Circuit in refusing to comply with the Act. This inconsistency in the application of a fundamentally important federal statute that promotes fair competition in interstate commerce by regulating employment relations is precisely the type of issue that warrants review by this Court.

The Department's interpretation of the FLSA is particularly significant because the Department also is responsible for ensuring compliance with the Ashurst-Sumners Act. See Ashurst-Sumners Act, 18 U.S.C. § 1761 (requiring the Secretary of Labor to submit annual reports to Congress describing the extent and manner of compliance with 18 U.S.C. § 1761(c)). Thus, while the majority below deemed the FLSA's concern with unfair competition supplanted by the Ashurst-Sumners Act, the agency responsible for administering *both* the FLSA *and* Ashurst-Sumners has perceived no conflict between the two statutes, and has expressly concluded that the FSLA's purposes apply to prison labor.

3. In addition to creating inter-circuit conflicts as well as an interpretive conflict between the judicial and Executive branches, the decision of the majority below is fundamentally flawed. This Court has repeatedly admonished courts to construe the FSLA's operative terms broadly and its exemptions narrowly in order to effectuate the Act's sweeping goals. See, *e.g.*, *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 295-96 (1985); *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 31-32 (1961). In addition, because the Act specifically lists categories of workers who are exempted from its coverage, this Court has reasoned that "[s]uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517 (1950). Although the majority below paid lip service to these principles, it completely subverted them by engrafting onto the statute a new exemption that broadly excludes from the Act all prisoners who are compelled to work in "programs structured by the prison" (Pet. App. at 12a-17a). As the dissenters noted below, neither the exemption itself, nor the limitations the majority placed upon it, find any support in either the language or legislative history of the FLSA. See Pet. App. at 35a-36a.

The majority's holding, moreover, does violence to one of the Act's central aims. It is undisputed that ARCOR goods, which are made with sub-minimum wage labor, compete in interstate commerce with goods produced by employers who pay the minimum wage or better. As the dissenters explained, an increase in goods "produced by cheap inmate labor inevitably undercuts the bargaining power of the free workers Congress designed the FLSA to protect. . . . [T]he absence of a level playing field between prison and private sector . . . producers will 'spread and perpetuate' unemployment and substandard labor conditions among workers in the private sector." Pet. App. at 31a-32a.

Lacking an economically plausible response to this argument, the majority below deemed this concern of the FLSA inapplicable in light of the Ashurst-Sumners Act. According to the majority, by proscribing the interstate transportation of all prison-made goods except those produced in certified programs, the Ashurst-Sumners Act effectively obviates congressional concern with the unfair competitive impact of goods made with cheap prison labor. Accordingly, the majority reasoned, there is no reason to construe the FLSA as requiring payment of the minimum wage to prison workers. Pet. App. at 17a-20a.

This argument is demonstrably wrong. Whatever the overlap between the two statutes, the Ashurst-Sumners Act does not "occupy the entire field" of prisoner wage regulation, as this very case demonstrates. Although Arizona's IOBE program received a certificate of compliance under 18 U.S.C. § 1761(c), it is undisputed that the prisoners who worked in that program were *not* paid the minimum wage. Contrary to the majority's assertion, therefore, the existence of the Ashurst-Sumners Act does not effectively prevent the unfair competitive effects of cheaply made prison goods, and thus does not render the FSLA's concern with such effects inapplicable to such goods.[8]

Nor is it true that application of the FLSA would render the Ashurst-Sumners Act superfluous. In except-

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[8] Moreover, Congress could reasonably assume that the Ashurst-Sumners Act would not completely eliminate the transportation of goods made with cheap prison labor. In fact, as of 1987, there were 23 non-certified prison industries projects, some of which "place products in interstate commerce . . . and are therefore operating in violation of the interstate commerce prohibition." *Work in American Prisons: The Private Sector Gets Involved*, U.S. Dep't of Justice, Nat'l Inst. of Justice (May 1988) ("*Work in American Prisons*") at 11. In the absence of perfect compliance or enforcement of the Act, of course, the FLSA's competitive concerns continue to apply to prison-made goods.

ing from its general prohibition goods made in designated prison pilot programs, the Ashurst-Sumners Act requires that workers in such programs receive "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed." 18 U.S.C. § 1761(c)(2). Thus, in all localities in which the "prevailing wage" exceeds the federal minimum wage, the Ashurst-Sumners Act will have independent force by compelling payment of this higher wage.

Indeed, in *Powell*, this Court considered and rejected a virtually identical argument to that relied upon by the majority below. There, the Court concluded that the FLSA extended to employees of government contractors notwithstanding the fact that, two years before passage of the FLSA, Congress had passed the Walsh-Healey Act, which prescribed payment of "prevailing wages" to this very class of workers. The Court explained that, as is true here, there was no evidence that "compliance with one Act makes it impossible to comply with the other." 339 U.S. at 519. In addition, the Court noted that, although in most instances "the 'prevailing minimum wages' required by the Walsh-Healey Act [would be] more advantageous to employees than the minimum wages prescribed by the [FLSA]," "the remedial procedure under the later Act [*i.e.*, the FLSA] [is] generally more advantageous to employees." *Id.* That situation is equally present here: the Ashurst-Sumners Act provides for payment of prevailing wages but includes no private right of action permitting prisoners to recover such wages; the FLSA requires payment of what will usually be the lower minimum wage, but provides private and administrative enforcement mechanisms. See 29 U.S.C. § 216(b) & (c).

In short, as the Labor Department's enforcement of these two Acts makes clear, the FLSA and Ashurst-Sumners Act are not mutually exclusive but rather complementary laws. Accordingly, the latter statute does not limit the reach of the former.

4. The question presented by this petition is a recurring one that affects far more than the petitioners involved in this case. As of 1987, there were 38 private-sector prison industries operating in 26 prisons in 14 states and employing more than 1,000 prisoners. *Work in American Prisons* at v & 17. Many of these prison-based businesses provide goods and services in interstate commerce. Indeed, 10 years ago, prison industries grossed more than $21 million in sales. *The Private Sector and Prison Industries,* U.S. Dep't of Justice, Nat'l Inst. of Justice (Aug. 1985) at 6. By the end of 1986, one Best Western International, Inc. reservation center staffed by Arizona inmates handled 2.5 million calls, representing $72 million in room reservation sales. *Work in American Prisons* at 28. That same year, a Trans World Airlines reservation system operated at a California correctional facility handled approximately $1 million in airline ticket sales. *Id.* at 30.

Paying sub-minimum wages to inmate workers at prison-based businesses that offer goods and services in interstate commerce inevitably gives rise to unfair competition that is harmful to private sector businesses and the employees of those businesses. Although it is impossible to quantify either the number of businesses and employees affected, or the magnitude of the effect, the increasing prevalence of prison-based industries makes clear that a significant segment of the national economy is and has been adversely affected by the decision of the majority below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-15785, 89-15162

FELTON HALE and RICHARD S. BERRY,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; ARCOR ENTERPRISES, a subdivision of the state; JAMES RICKETTS, former director of the Arizona Department of Corrections (DOC); SAMUEL LEWIS, director of the DOC; MARILYN WILKENS, director of Arizona Correctional Industries; THOMAS LESCAULT, director of ARCOR; TONY WEST, DAVID TIERNEY, EARL COBB, THOMAS DONNELLY, HENRY EVANS, MARCUS ENGLEMEN, DELBERT HOUSEHOLDER, and RAY SHAFFER, members of the Board of Directors, ARCOR Enterprises,
Defendants-Appellees.

JOHN LEROY FULLER, *et al.*,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; ARCOR ENTERPRISES, a subdivision of the state; JAMES RICKETTS, former director of the Arizona Department of Corrections (DOC); SAMUEL

LEWIS, director of the DOC; MARILYN WILKENS, director of Arizona Correctional Industries; THOMAS LESCAULT, director of ARCOR; TONY WEST, DAVID TIERNEY, EARL COBB, THOMAS DONNELLY, HENRY EVANS, MARCUS ENGLEMEN, DELBERT HOUSEHOLDER, and RAY SHAFFER, members of the Board of Directors, ARCOR Enterprises; RICHARD ORBERG, ARCOR Vice President of Operations; KENNETH VAN DE VEER, ARCOR Vice President of Business and Finance; JOHN F. WRIGHT, former interim CEO, ARCOR; JAMES KINSELLA, former ARCOR Vice President of Business and Finance; GILBERT EVANS, former ARCOR director of operations; RALPH CLUFF, ARCOR operations and control officer; MICHAEL ULLERY, former interim ARCOR operations and control officer,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona

Argued En Banc and Submitted Nov. 12, 1992

Decided May 4, 1993

Michael E. St. George, St. George and Reed, Tempe, AZ, for plaintiffs-appellants.

Anthony B. Ching, Sol. Gen., State of Ariz., Phoenix, AZ, for defendants-appellees.

Before: BROWNING, SCHROEDER, FLETCHER, ALARCON, POOLE, NORRIS, BRUNETTI, NOONAN, LEAVY, RYMER, and T.G. NELSON, Circuit Judges.

RYMER, Circuit Judge:

Felton Hale, John Leroy Fuller and other inmates in Arizona correctional facilities who have worked for state prison industries programs seek to be paid the federal minimum wage on the ground that they are "employees" of the prison under the Fair Labor Standards Act, (FLSA), 29 U.S.C. §§ 201, et seq. They filed complaints against the State of Arizona, ARCOR Enterprises (ARCOR) and its successor Arizona Correctional Industries (ACI), and officials of the Arizona Department of Corrections (DOC), ARCOR, and ACI for damages and injunctive relief under the FLSA, 42 U.S.C. § 1983, and Arizona law. The district court in *Hale* granted summary judgment in favor of all defendants because it found no employer-employee relationship under the FLSA and no jurisdiction over state claims or retrospective federal claims because of the Eleventh Amendment. The district court in *Fuller* dismissed all claims for lack of jurisdiction except the § 1983 claim for injunctive relief against state officers; as to it, the district court retained jurisdiction but stayed further proceedings pending resolution of this appeal. The prisoners do not pursue their state law claims.[1]

This appeal requires us to decide whether the FLSA applies to prisoners, whether the inmates here are "employees" who are entitled to be paid a minimum wage under the FLSA, and whether the prisoners have identified a property interest that is protected under the due process clause and gives rise to a claim under 42 U.S.C.

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[1] We have consolidated the two separate appeals from inmates in *Fuller* and *Hale*. The claims of 296 plaintiffs are consolidated in *Fuller*. All have appealed. Only one plaintiff, Richard Berry, has appealed in *Hale*.

§ 1983. We must also determine to what extent the prisoners' claims are barred by the Eleventh Amendment.

We consider these questions en banc to resolve the tension between our decision in *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir.1991), and the panel opinion in this case, *Hale v. Arizona*, 967 F.2d 1356 (9th Cir.1992). In *Gilbreath*, we held that prisoners working within the prison for a private plasma treatment center were not "employees" of Cutter, which ran the lab.[2] The panel in these consolidated appeals held that prisoners working for a state prison industries program and for a prisoner-owned enterprise within that program were "employees" of the state under the FLSA.[3] While we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case, who worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, are not "employees" of the state within the meaning of the FLSA. The Eleventh Amendment affords no immunity to the state from suit for violations of the FLSA; however, the state is not a "person" within § 1983 and the Eleventh Amendment shields its officials from claims for damages under § 1983. As there is no factual basis for the injunctive relief sought in *Hale*, we affirm both decisions.

I

Arizona prisoners are required by statute to "engage in hard labor for not less than forty hours per week."[4] Ariz.Rev.Stat. § 31-251(A). Pursuant to this requirement, Arizona prison authorities have structured various

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[2] Judge D.W. Nelson dissented.

[3] Judge Fletcher dissented, on the footing that the panel was bound by *Gilbreath*.

[4] Not all inmates fulfill this obligation, because of the absence of available work. This, however, is immaterial to the issue of whether those who do work are "employees" for purposes of the FLSA.

programs for convict labor, including the two programs involved in this case. The *Fuller* inmates worked for ARCOR (known as ACI since 1987), which is organized pursuant to Ariz.Rev.Stat. §§ 41-1621 et seq. and operated by the Department of Corrections. ARCOR sets up and supervises "industries or enterprises . . . for the employment of prisoners in the manufacture . . . of such . . . products as may be needed . . . by a state . . . or for sale to the public." Ariz.Rev.Stat. § 41-1622. Ten to twenty percent of Arizona prisoners work for the ARCOR correctional industries program, whose goods and services include clothing, fabricated steel, livestock, dairy products, and hotel reservations for Best Western motels. Revenue from ARCOR enterprises is placed in a revolving fund, and ARCOR pays the inmates who work for it out of that fund. *See* Ariz.Rev.Stat. § 41-1624.[5]

The prison labor program in *Hale*, also offered through ARCOR, allows the establishment of an Inmate-Operated Business Enterprise (IOBE). The IOBE program permits an inmate to organize and operate a business under ARCOR supervision. ARCOR retains a portion of IOBE gross sales to pay for utilities and collects a monthly rent. Inmate wages are paid to ARCOR, which makes disbursements to inmate workers out of the ARCOR revolving fund. Berry, the only *Hale* plaintiff who appeals, worked as a bookkeeper and office manager for C/A Buckles, an IOBE enterprise which made and sold western and logo belt buckles to various entities including the United States Marine Corps, Mountain Bell, U-Haul, and Speed-O-Fam in London, England. ARCOR leased space for the business, outside the prison walls, to the inmate-owner. C/A Buckles employed a dozen in-

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[5] At the time these actions were filed, inmate wages could not be paid out of general state funds. *See* former Ariz.Rev. Stat. § 41-1624(A)(2). This restraint has subsequently been deleted. See Ariz.Rev.Stat. § 41-1624.

mates, exhibited and sent catalogs to prospective buyers, and shipped hundreds of buckles monthly.[6]

II

We have jurisdiction over these appeals under 28 U.S.C. § 1291. The district court in *Hale* entered summary judgment as to all claims. The district court in *Fuller* dismissed all claims except the claim for prospective relief under 42 U.S.C. § 1983, over which it retained jurisdiction. The court found no just reason for delay and entered final judgment on the remaining claims, which suffices to make its order final and appealable under Fed.R.Civ.P. 54(b). *See Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987) (expansively construing discretion of district court in entering partial summary judgment under Rule 54(b)). Thus, we have jurisdiction over all claims in these matters except the § 1983 claim for prospective relief in *Fuller*.

The *Fuller* appellees contend that the notice of appeal in that case does not "specify the party or parties taking the appeal" as required by Fed.R.App.P. 3(c) and that this court therefore lacks appellate jurisdiction as to all parties except John Leroy Fuller. We disagree. All plaintiffs in the *Fuller* action were consolidated pursuant to court order. The notice of appeal in *Fuller* refers in its caption to "JOHN LEROY FULLER Plaintiffs" and in its text to "plaintiff consolidated in the captioned cause." In *Gilbreath*, we construed substantially identical language as adequately identifying consolidated plaintiffs on appeal. *See id.*, 931 F.2d at 1322-23. The notice of appeal here is similarly sufficient.

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[6] Berry also worked as a clerk in the prison warehouse. The warehouse is outside the prison walls, and the job consisted of inventorying supplies for prison units. He applied for both jobs, which are sought after, having first worked as a prison librarian and a kitchen worker.

The inmate owner of C/A Buckles is not a defendant in *Hale*.

We review de novo a district court's grant of either a motion for summary judgment or a motion to dismiss. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). In reviewing the summary judgment in *Hale*, we determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989). When reviewing dismissal of the *Fuller* complaint, we examine the allegations of the complaint and determine whether there is any set of facts which could entitle the plaintiffs to the relief they seek. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.), *cert. denied*, *City of Manhattan Beach v. Buckey*, —— U.S. ——, 113 S.Ct. 599, 121 L.Ed.2d 536 (1992)

III

We must first resolve Arizona's argument that the Eleventh Amendment bars a suit under the FLSA against a state or its employees. It contends that amendments which extended FLSA coverage to state employees did not abrogate the states' Eleventh Amendment immunity. Arizona further argues that the power of the federal government to subject the states to regulation does not extend to subjecting a state to the jurisdiction of the federal courts.

Congress has the power under the Commerce Clause to annul a state's Eleventh Amendment immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15, 109 S.Ct. 2273, 2281, 105 L.Ed.2d 1 (1989) (abrogation of Eleventh Amendment immunity by CERCLA). When abrogating a state's immunity, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985).

As we held in *Gilbreath*, Congress has made its intention clear in the FLSA. By its terms, the FLSA applies to "any individual employed by a State [or a] political subdivision of a State." 29 U.S.C. § 203(e)(2)(C). Further, the Act provides that an action to enforce the FLSA "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). A public agency explicitly includes "the government of a State or political subdivision thereof." 29 U.S.C. § 203(x). By this language, Congress has made unmistakably clear its intention to apply the FLSA to the states.

It has likewise manifested the intention that FLSA claims, including those against state employers, may be heard in federal court. Arizona argues that *Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), which held that the 1966 amendments to the FLSA extending coverage to state employees did not abrogate the states' Eleventh Amendment immunity, *id.* at 285, 93 S.Ct. at 1618, controls. However, after the opinion in *Employees*, Congress amended § 16(b) of the FLSA (29 U.S.C. § 216(b)) in 1974. *See* Fair Labor Standards Amendments of 1974, § 6(d)(1), 88 Stat. 55, 61 (1974). Originally, and at the time *Employees* was decided, § 16(b) provided: "An action to recover [the liability for violating the minimum wage provisions] may be maintained in any court of competent jurisdiction. . . ." Fair Labor Standards Act, § 16(b), 52 Stat. 1060, 1069 (1938). The 1974 amendment expanded the definition to provide: "An action to recover [such liability] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. § 216(b). The specific inclusion of "public agenc[ies]" and the addition of "any Federal or State court" make the intent of Congress to render states amenable to suit under the FLSA in federal court unmistakably clear.

Arizona contends, nevertheless, that there is a difference between a state's immunity from federal regulation, which is a Tenth Amendment issue resolved by the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and its immunity from suit in a federal court, which is an Eleventh Amendment issue. It notes that states may be sued for FLSA violations in state courts, and argues that neither *Garcia*, nor the post-*Garcia* amendment which gave states more time to comply with the FLSA, Fair Labor Standards Amendments of 1985, sec. 7, 99 Stat. 791 (1985), waives a state's immunity from being haled into federal court. Arizona cites no authority in support of this argument, and we believe it fails in the face of Eleventh Amendment jurisprudence which holds that Congress may, if it does so clearly enough, abrogate immunity from suit as well as from regulation.

Garcia, which held that there is no constitutional barrier to applying the FLSA to all state employees, 469 U.S. at 554, 105 S.Ct. at 1019, overruled *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), which had held that the Tenth Amendment bars Congress from applying the FLSA to the states "in areas of traditional governmental functions." *Id.* at 855, 96 S.Ct. at 2476. After the decision in *Garcia*, Congress recognized the greater financial burden states would have to bear under *Garcia* than under *National League of Cities*, and amended the Act to give them time to adjust. *See* Fair Labor Standards Amendments of 1985, S.Rep. No. 159, 99th Cong., 1985 U.S.C.C.A.N. 651, 654-56. Arizona argues that this amendment merely gave states more time, but did not waive the Eleventh Amendment defense to an FLSA action. As we read it, however, the *Garcia* amendment, which provided a grace period for the additional state employees brought within the FLSA, was consistent with the intent already manifested in amended § 16(b), that states may be sued by an employee in federal court for violations of the FLSA.

Arizona's argument, therefore, makes too much of the fact that *Garcia* was "just" a Tenth Amendment case. Rather, on Eleventh Amendment issues we are guided by *Union Gas* and *Scanlon*, which direct us to look to the legislation itself. The FLSA, as it has been amended, leaves no doubt that Congress did not intend the Eleventh Amendment to bar FSLA claims by state employees in federal court.

IV

A

Assuming there is no Eleventh Amendment barrier to the FLSA claims in *Hale* and *Fuller*, as we have now held, Arizona argues that the FLSA does not apply to prisoners. Relying on Judge Trott's opinion in *Gilbreath*,[7] Arizona reasons "that it is highly implausible that Congress intended the FLSA's minimum wage protection [to] be extended to felons serving time in prison." *Gilbreath*, 931 F.2d at 1324. While it may be difficult to believe that Congress actually gave thought to the problem and decided to include prison labor within the FLSA, we cannot agree that the FLSA categorically excludes all labor of any inmate.

As a matter of statutory construction, prisoners are not on the statutory list of workers who are exempted from the FLSA. *See* 29 U.S.C. § 213. "[S]pecificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517, 70 S.Ct. 755, 766, 94 L.Ed. 1017 (1950). Because Congress has specifically exempted nine broad categories of workers from the minimum wage provisions of the FLSA, *see* 29 U.S.C. § 213(a), but not prisoners, we are hard pressed to conclude that it nevertheless intended for all inmates to be excluded. That is a decision for the Congress, not

[7] Judge Trott's view that the FLSA can never apply to prisoners was not joined by either the concurring or dissenting judge.

the courts, to make. *See Carter v. Dutchess Community College*, 735 F.2d 8, 13 (2d Cir.1984) ("It would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act.").[8]

In addition to what we infer from the scheme of this statute, we have previously indicated in connection with another statute that prisoners may have an employment relationship with a prison. In *Baker v. McNeil Island Corrections Ctr.*, 859 F.2d 124 (9th Cir.1988), which was a Title VII action by a prisoner who claimed he was denied employment in the prison library on account of his race, we held that a prisoner may be an "employee." 859 F.2d at 127-28. Although the status of prisoners under Title VII is not conclusive of their status under the FLSA, we cannot ignore the similarity between the definitions of "employee" in the statutes. *See Hyland v. New Haven Radiology Assoc.*, 794 F.2d 793, 796 (2d. Cir.1986) ("Since all three statutes [Title VII, the FLSA, and the Age Discrimination in Employment Act] have a similar purpose—to stamp out discrimination in various forms—cases construing the definitional provisions of one are persuasive authority when interpreting the others."). *But see Vanskike v. Peters*, 974 F.2d 806, 810 n. 5 (7th Cir. 1992) (distinguishing *Baker* in context of FLSA), *cert. denied*, —— U.S. ——, 113 S.Ct. 1303 122 L.Ed. 2d 692 (1993). While *Baker* is not controlling in this case, we are constrained not to hold as a matter of law that prisoners may *never* be "employees" of a prison.

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[8] The Second Circuit's decision in *Carter*, holding that the FLSA may apply to a prisoner who works for an outside employer, 735 F.2d at 15, was handed down in 1984. Congress has amended the FLSA twice since then, *see* Fair Labor Standards Amendments of 1985, 99 Stat. 787 (1985), and Fair Labor Standards Amendments of 1989, 103 Stat. 98 (1989), without taking action to limit *Carter*. Under these circumstances, congressional silence on the applicability of the FLSA to prisoners is some indication of its intent not to exempt prisons from the FLSA.

Finally, we are influenced by other circuits which have held that the FLSA may be applicable to prison inmates under certain circumstances. *See Vanskike*, 974 F.2d at 808 ("We do not question the conclusions of *Carter*, *Watson* and [the panel opinion in] *Hale* that prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners."); *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990) (prisoners on work release); *Carter* (prisoner tutoring community college students). For prudential reasons, we avoid unnecessary conflicts with other circuits and are not persuaded that we should part company on this point.

B

The question we must resolve is whether inmates working for a prison, in a program structured by the prison pursuant to state law requiring prisoners to work at hard labor, are "employees" of the prison within the meaning of the FLSA.

Prisoners first argue that they are employees within the FLSA because the State of Arizona and ARCOR "suffer or permit [them] to work." 29 U.S.C. § 203(g).[9] They suggest that Arizona does not have to establish a correctional industries program, but chose to let ARCOR hire inmate labor; that an employment relationship exists because ARCOR profits from the work inmates perform; and that even though penological interests may be paramount in the prison-prisoner relationships, an employer-employee relationship may exist at the same time. Arizona responds that § 203(g)'s language must be "understood with common sense," *Walling v. Jacksonville Terminal*

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[9] They also point to child labor regulations which state:

> The words "suffer or permit to work" include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract.

29 C.F.R. 570.113(a).

Co., 148 F.2d 768, 770 (5th Cir.1945), and the common sense of it is that inmates are required to work as a function of their incarceration.

By its terms, the FLSA requires states to pay their employees the minimum wage. "Employee" is defined as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), including "any individual employed by a State," 29 U.S.C. § 203(e)(2)(C). "Employer" includes "a public agency," 29 U.S.C. § 203(d). "Employ" includes "to suffer or permit to work." 29 U.S.C. § 203(g).

The Supreme Court has instructed that courts are to interpret the term "employ" in the FLSA expansively. *See Nationwide Mut. Ins. Co. v. Darden*, —— U.S. ——, ——, 112 S.Ct. 1344, 1350, 117 L.Ed.2d 581 (1992). It has also held that, as a general rule, whether there is an employment relationship under the FLSA is tested by " 'economic reality' rather than 'technical concepts.' " *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961).

We elaborated the economic reality test in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir.1983) by indicating that courts are to consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. *Id.* at 1470. While these factors "provide a useful framework for analysis . . . , they are not etched in stone and will not be blindly applied." *Id.*

Inmates argue that the prison had the right to "hire and fire" them by allowing or disallowing them to work, controlled the time and conditions under which they worked, determined the rate of pay, and kept records. Arizona argues that it has only a security interest in inmates and

maintains control over an inmate employee as it does over any convicted inmate in its custody.

Regardless of how the *Bonnette* factors balance, we join the Seventh Circuit in holding that they are not a useful framework in the case of prisoners who work for a prison-structured program because they have to.[10] In *Vanskike v. Peters*, 974 F.2d 806 (7th Cir.1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1303, 122 L.Ed.2d 692 (1993), the plaintiff inmate worked in Illinois prisons as a janitor, kitchen worker, gallery worker, and knit-shop worker. As Judge Cudahy wrote for the court,

> the *Bonnette* factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation. Put simply, the DOC's "control" over [the prisoner] does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself. The control that the DOC exercises over a prisoner is nearly total, and control over his work is merely incidental to that general control.

974 F.2d at 809. *See also Gilbreath*, 931 F.2d at 1331 (no employment relationship because "inmate labor belongs to the institution") (concurring opinion); *Harker v. State Use Indus. Envelope Shop Inmates*, 990 F.2d 131, 133 (4th Cir. Mar. 24, 1993) (*quoting Vanskike*; *citing Gilbreath*); *Alexander v. SARA, Inc.*, 721 F.2d 149, 150 (5th Cir.1983) ("there was no employer-employee relationship, because the inmates' labor belonged to the penitentiary"). *Cf. Alvarado Guevara v. INS*, 902 F.2d 394, 396 (5th Cir.1990) (INS detainees who "are under the direct supervision and control of a

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[10] Inmates submit that it is significant that they had to apply for the work they did and were screened for security and other purposes. The fact that prison authorities may have structured certain programs more selectively than others does not, however, make them less of a prison-structured program pursuant to the State of Arizona's requirement that prisoners work at hard labor.

government entity should not be protected under the FLSA").

In *Bonnette* we were considering whether chore workers paid for by California and federal funds but supervised by the persons for whom they provided home care services were employees under FLSA. *Bonnette*, 704 F.2d at 1467-68. The case of inmate labor is different from this type of situation where labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. *See Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.), *cert. denied*, 375 U.S. 915, 84 S.Ct. 214, 11 L.Ed.2d 153 (1963). Under Arizona law, the state "has the authority to require that each able-bodied prisoner . . . engage in hard labor for not less than forty hours per week. . . ." Ariz.Rev.Stat. § 31-251(A). Therefore, as *Vanskike* focused the question:

> The *Bonnette* factors, with their emphasis on control over the terms and structure of the employment relationship, are particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an "employer" and the question is which one. The dispute in this case is a more fundamental one: Can [these] prisoner[s] plausibly be said to be "employed" in the relevant sense at all?

974 F.2d at 809.

We think not, because in both *Fuller*, where the inmates worked for ARCOR, and *Hale*, where Berry worked both for ARCOR and an inmate operated enterprise, the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary. As Judge Cudahy wrote in *Vanskike:*

> Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.

974 F.2d at 810. Thus, the totality of the circumstances does not bespeak an employer-employee relationship as contemplated by the FLSA.

In this view we are not influenced by Arizona's reliance on state law which declares that an inmate is not an employee of the State or the DOC, Ariz.Rev.Stat. § 31-254(J) (formerly Ariz.Rev.Stat. § 31-254(I)).[11] Prisoners correctly contend that federal law controls their status as employees under the FLSA and that the state cannot rely on § 31-254(J) to defeat their claim. Under the Supremacy Clause, this state statute has no effect on the scope of the FLSA.

However, we are influenced by the fact that no other circuit has construed the relationship between a prison and a prisoner with a hard-time obligation who works on a program structured by the prison as an employment relatonship within the FLSA. *See Vanskike*; *Alexander v. SARA, Inc.*, 559 F.Supp. 42 (M.D.La.) (labor in plasmapheresis program run by outside company belonged to institution), *aff'd*, 721 F.2d 149 (5th Cir.1983); *Sims v. Parke Davis & Co.*, 334 F.Supp. 774 (E.D.Mich.) (work assignments up to prison), *aff'd*, 453 F.2d 1259

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[11] Section 31-254(J) provides:

> Nothing in this section is intended to restore, in whole or in part, the civil rights of any prisoner. No prisoner compensated under this section shall be considered as an employee or to be employed by the state or the department of correction, nor shall any such prisoner come within any of the provisions of the workers' compensation . . . or be entitled to any benefits thereunder whether on behalf of himself or of any other person.

(6th Cir.1971), *cert. denied*, 405 U.S. 987, 92 S.Ct. 1196, 31 L.Ed.2d 254 (1972); *Hudgins v. Hart*, 323 F.Supp. 898 (E.D.La.1971) (prisoner worked at plasma treatment center pursuant to sentence to hard labor); *see also Watson* (distinguishing *Alexander*, *Hudgins*, and *Young v. Cutter Biological*, 694 F.Supp. 651 (D.Ariz. 1988), *aff'd sub nom. Gilbreath v. Cutter Biological*, 931 F.2d 1320 (9th Cir.1991) because of hard-time obligation and holding that prisoner on work release program was employee of outside company for whom work was performed). This follows because, as the Fifth Circuit put it in *Watson*, "the 'hard time' inmates' labor d[oes] indeed 'belong to the institution' and c[an] be disposed of legitimately within the discretion of the correction facility or agency." 909 F.2d at 1555.

Because prisoners in *Hale* and *Fuller* worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution. We hold, therefore, that they were not "employees" of the prison entitled to be paid a minimum wage under the FLSA.

C

Inmates urge that to deny them a minimum wage would thwart the intent of Congress in the FLSA to protect against unfair competition in the market place for both goods and labor. They argue that putting a floor under the wages prisoners are paid to make prison goods assures the private sector in competition with those goods a fair opportunity of gaining the customer, and they make the point that the mere fact that prison workers are "captive" does not make their product less intrusive upon interstate commerce if, as here, the products enter the stream of interstate commerce. Arizona counters that the primary purpose of the FLSA is to promote and improve the standard of living of workers, whereas the Ashurst-Sumners Act, ch. 412, 49 Stat. 494 (1935)

(codified as amended at 18 U.S.C. §§ 1761-1762 (1992)), which was enacted before the FLSA to criminalize the transportation of prison-made goods in interstate commerce, was intended to prohibit and penalize unfair competition in the market for products. It contends that Ashurst-Sumners in effect occupies the field for production of prison goods and payment of wages to prisoners and for this reason, Arizona argues, Congress did not intend the FLSA to apply to prison labor. Inmates, on the other hand, see Ashurst-Sumners as an extension of the FLSA because its purpose, like that of the FLSA, is to promote the lot of the individual worker and protect other workers from unfair competition from products made by underpaid labor.

Our conclusion that prisoners in these cases are not "employees" of the prison entitled to a minimum wage is consistent with the purpose of the FLSA. It was enacted because Congress found that the existence "in industries engaged in commerce or in the production of goods for commerce" [12] of labor conditions detrimental to maintaining minimum standards of living necessary for health, efficiency and general well-being of workers perpetuates substandard conditions among workers, burdens commerce, constitutes an unfair method of competition in commerce, leads to labor disputes, and interferes with the orderly and fair marketing of goods. 29 U.S.C. § 202 (a).[13] We agree with Arizona that the problem of sub-

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[12] " 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed." 29 U.S.C. § 203(h). This definition does not neatly fit prison industries, even those engaged in the production of goods for commerce, since prisoners whose labor is required by statute cannot be said to be "gainfully employed."

[13] Section 202a declares in full:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the mini-

standard living conditions, which is the primary concern of the FLSA, does not apply to prisoners, for whom clothing, shelter, and food are provided by the prison. *See Vanskike*, 974 F.2d at 810 ("the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a 'minimum standard of living' "); *Alexander*, 721 F.2d at 150 (labor of inmates sentenced to hard labor belongs to the institution, so there is no need to protect "the standard of living and general well-being of the worker in American industry").

Nor do we believe that a different result is required because of Congress's concern that substandard wages cause unfair competition. Even though "unfair competition," broadly conceived, encompasses both product and labor markets, the effect in the labor market is what prompted congressional concern with unfair competition in the FLSA. As President Roosevelt's message to Congress accompanying the FLSA stated:

> And so to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce.

President Roosevelt's Message to Congress on the Fair Labor Standards Act, May 24, 1937, in S.Rep. No. 884,

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mum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. . . .

29 U.S.C. § 202(a).

75th Cong., 1st Sess., at 2. The Supreme Court recognized the same point in *Powell*:

> In this Act [the FLSA], the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.

339 U.S. 509-10, 70 S.Ct. at 762. Congress has quoted this language several times in the legislative history of subsequent amendments to the FLSA. *See, e.g.*, Fair Labor Standard Amendments of 1961, S.Rep. No. 145, 87th Cong., 1961 U.S.C.C.A.N. 1620, 1625; Fair Labor Standards Amendments of 1974, H.R.Rep. No. 913, 93rd Cong., 1974 U.S.C.C.A.N. 2811, 2817. Thus, while the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition, nothing in the FLSA indicates that that fact alone should convert the relationship between prison and prisoner to one of employer-employee such that prisoners working on a program structured by the prison are entitled to a minimum wage.[14]

We are buttressed in this view because Congress has specifically addressed its concern with unfair competition in the products markets from prison-made goods in the Ashurst-Sumners Act.[15] That Act was intended to combat

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[14] We disagree with the dissent's contention that Congress's stated concern with unfair competition in § 202(a) of the FLSA controls the determination of the presence of an employment relationship, as defined in § 203 of the FLSA. While prevention of unfair competition is one of the five purposes of the FLSA, *see supra* note 13, no case has ever treated the presence of unfair competition as an element of an action under the FLSA.

[15] Section 1 of the Act, as amended, provides:

> (a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods,

"the evils attending the sale of [prison-made] goods in competition with goods manufactured and produced by free labor," S.Rep. No. 906, 74th Cong., 1st Sess. (1935), and "proceeded upon the view 'that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.'" *Kentucky Whip & Collar Co. v. Illinois Cent. Ry Co.*, 299 U.S. 334, 351, 57 S.Ct. 277, 282, 81 L.Ed. 270 (1937).[16] As Judge Cudahy wrote in *Vanskike*, "[i]t is difficult to imagine that Congress would have enacted legislation in 1938 that rendered its recently passed prison-goods law essentially superfluous (for the FLSA, so construed, would have addressed the problem of unfair competition from cheaply made prison goods by eliminating the low-labor-cost advantage)." 974 F.2d at 812; *see also Harker*, at 134.

Ashurst-Sumners has since been amended, most substantively in 1979 when Congress excepted goods made by prisoners in pilot projects who are paid the prevailing wage in the locality, less 80% for taxes, room and board, family support payments and victim compensation. Justice System Improvement Act of 1979, § 827(a), 93 Stat. 1215 (1979) (codified as amended at 18 U.S.C. § 1761

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wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1761(a).

[16] Whatever the views of Congress on unfair competition in adopting the Ashurst-Sumners Act, it is clear that the statute, which was enacted three years before the FLSA, in no way creates a right to minimum wage for prisoners under the later statute. *See Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1977) (no private cause of action for minimum wages under 18 U.S.C. § 1761). Indeed, the implication of the Ashurst-Sumners Act is that prisoners may be paid lower wages than non-prisoners—otherwise the statute would not be necessary.

(c) (1992)).[17] Therefore, legislation dealing with the distribution of prisoner-made goods in commerce, and in competition with similar products produced by others, has been in place throughout the history of the FLSA. This suggests that Congress did not intend its general concern with unfair competition in the FLSA to require payment of minimum wages to prisoners working for prison programs, as its more specific concern with unfair competition on account of prison-made goods had been dealt with in the Ashurst-Sumners Act. Rather, the fact that Ashurst-Sumners precludes—and prescribes a remedy in the form of criminal sanctions for—introduction of low-cost prison goods into the channels of commerce to protect private business from competition in the product market indicates that Congress's concern with unfair competition in the FLSA will not be subverted by declining to apply its minimum wage standards to convict labor in prison-structured programs.[18]

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[17] The IOBE program in *Hale* received a certificate of compliance with 18 U.S.C. § 1761(c). Inmates suggest that this approval was based on false representations by ARCOR; however, whether Arizona is or is not in compliance with § 1761 is not material to this appeal. Both parties agree that the Ashurst-Sumners Act is a criminal statute that affords no private, civil right of action. There is, in any event, no evidence of criminal prosecution for noncompliance.

[18] The dissent argues that the FLSA and the Ashurst-Sumners Act are "mutually-supplementary," like the FLSA and the Walsh-Healey Act, ch. 881, 49 Stat. 2036 (codified as amended at 41 U.S.C. §§ 35-45) as interpreted in *Powell*, 339 U.S. at 515-20, 70 S.Ct. at 764-767. Dissent at 1404. We disagree for several reasons. First, the Walsh-Healey Act applies to "all persons employed" (41 U.S.C. § 35(b)) on government contracts who, unlike prisoners working pursuant to a hard labor requirement, fit the definition of "employees" under the FLSA. Second, the Walsh-Healey Act itself provides that it "shall not apply to convict labor which satisfies the conditions of section 1761(c) [of the amended Ashurst-Sumners Act]. . . ." 41 U.S.C. § 35(d). Third, the FLSA did not render the Walsh-Healey Act superfluous—as it would have rendered the

Finally, in considering whether Congress intended the FLSA to encompass convict labor in prison-structured programs, we cannot ignore the fact that prison industries programs have existed for a long time, Congress has been aware at least since passage of the Ashurst-Sumners Act in 1935 that prison-produced goods pose a threat to competition, and important penological purposes are served by these programs. Correctional industries of the sort sponsored by ARCOR in these cases occupy idle prisoners, reduce disciplinary problems, nurture a sense of responsibility, and provide valuable skills and job training. *See* Sharon Goodman, Note, *Prisoners as Entrepreneurs: Developing a Model for Prisoner-Run Industry*, 62 B.U.L. Rev. 1163, 1163-64 (1982) (citing various authority). Absent some framework similar to Ashurst-Sumners, which allows prisons to recoup expenses for room and board and requires prisoners to make payments for support and restitution, 18 U.S.C. § 1761(c)(2), Congress cannot have intended the FLSA to impose a minimum wage obligation that would jeopardize prison industries programs structured by and for prisons.

For these reasons, we conclude that the economic reality in *Hale* and *Fuller*—that prisoners who work for programs structured by a prison pursuant to state law requiring hard labor are not "employees" of the prison entitled to a minimum wage—comports with the purpose of the FLSA.

V

Inmates also argue that Ariz.Rev.Stat. § 31-254 and § 41-1623(E) (now repealed) give them a liberty interest in minimum wages of which they were deprived without due process of law. Section 31-254(A) provides, in part:

Ashurst-Sumners Act if applied to prison labor—because "the 'prevailing minimum wages' required by the Walsh-Healey Act [are in most instances] more advantageous to employees than the minimum wages prescribed by the [FLSA]. . . ." *Powell*, 339 U.S. at 519, 70 S.Ct. at 767.

> If the director [of the DOC] enters into a contract . . . with a private person, firm, corporation or association the compensation shall be as prescribed by the person, firm, corporation or association but shall not be below the minimum wage.

At the time the events at issue here took place, § 41-1623 (E) provided:

> Except as prohibited by applicable provisions of the United States Code, inmates of correctional institutions of this state may be employed in the manufacture and processing of products for introduction into interstate commerce, so long as they are paid no less than the prevailing minimum wage.

Inmates seek to enforce these rights under 42 U.S.C. § 1983.[19]

A

The State of Arizona argues that the Eleventh Amendment bars inmates' § 1983 claims for monetary damages and that § 1983 does not apply to a state or its officials. Section 1983 does not abrogate the states' Eleventh Amendment immunity from suit. *See Quern v. Jordan*, 440 U.S. 332, 344-45, 99 S.Ct. 1139, 1147, 59 L.Ed.2d 358 (1979). Furthermore, a state is not "person" within the meaning of § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-66, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989). This limitation on § 1983 also extends to "arms of the State." *Id.* at 70, 109 S.Ct. at 2311.

Inmates contend that the ARCOR program is financially separate from the state, in that its monies do not pass through the state general fund. Because ARCOR is like

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[19] As noted, *supra* at 1389, we lack jurisdiction over the *Fuller* plaintiffs' claim for prospective relief against state officials under § 1983, because the district court in *Fuller* did not enter final judgment as to that claim and retained jurisdiction as to it.

a private business, generating income apart from tax revenue or legislative appropriation, they suggest an award in this case would not impact the state treasury and thus does not implicate the Eleventh Amendment.

We have no trouble concluding that the Arizona Department of Corrections is an arm of the state. Whether ARCOR is, too, is a closer question. To determine if a governmental agency is an arm of the state, we look to state law and examine "whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir.1988), *cert. denied*, 490 U.S. 1081, 109 S.Ct. 2102, 104 L.Ed.2d 663 (1989).

Arizona law treats ARCOR as part of the state government. *See* Ariz.Rev.Stat. § 41-1621, et seq. ARCOR is managed by the director of the DOC, Ariz.Rev.Stat. § 41-1623(A), and intermingles its funds with the state treasury, Ariz.Rev.Stat. § 41-1624(C). The first two *Mitchell* factors therefore weigh in favor of finding that ARCOR is an arm of the state: a money judgment against ARCOR would be satisfied out of state funds, since the authorized purposes for the ARCOR revolving fund do not include payment of judgments, Ariz.Rev.Stat. § 41-1624(A), and ARCOR participates in the central governmental function of operation of prisions. Arizona law is not explicit as to the final three *Mitchell* factors. However, inmates admit in their pleadings that ARCOR is a subdivision of the State of Arizona. *See, e.g., Hale* First Amended Complaint ("defendant ARCOR Enterprises . . . [is a] subdivision[] of defendant state"); *Fuller* Complaint (same). *Cf. Sable Communications of California, Inc. v. Pacific Tel. and Tel. Co.*, 890 F.2d 184, 191 (9th Cir.1989) (California Public Utilities Com-

mission is an arm of the state); *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1442-43 (9th Cir.1989) (University of California is an arm of the state). For these reasons, we conclude that ARCOR is an arm of the State of Arizona and that it is not a person within § 1983.

Inmates argue that they may obtain monetary relief against the individual officials because they were acting outside the scope of their duties by refusing to follow the statutory duty to pay minimum wages. This allegation does not, however, avoid the Eleventh Amendment bar as the conduct complained of is not personal, and money damages for wages due would be paid out of the state treasury regardless of whether the officials were acting in accord with statutory duties. *See Edelman v. Jordan,* 415 U.S. 651, 653, 677, 94 S.Ct. 1347, 1351, 1362, 39 L.Ed.2d 662 (1974). Therefore, inmates may maintain an action under § 1983 against the individual officers for prospective relief only. *See Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (injunctive relief available under § 1983 against state official).

B

Berry is the only appellant whose claim for injunctive relief is before us. He asserts a protected interest in minimum wages under Arizona law. He contends that he seeks no more than the plaintiff in *Piatt v. MacDougall,* 773 F.2d 1032 (9th Cir.1985) (en banc), and that *Piatt* establishes a protected liberty interest in recovery of wages accrued under color of state law.

In *Piatt,* we were concerned with a prisoner's allegation that he had worked as part of a contract with a private entity and was therefore entitled to pay at least equal to the minimum wage under § 31-254. We held that the state had not deprived Piatt of a constitutionally protected liberty interest but that he could not be denied the property right to compensation created by statute without a meaningful hearing at a meaningful time. *Piatt,*

773 F.2d at 1036. Berry's request in this case is different, however, because he did not work for a private entity pursuant to a contract such that § 31-254's obligation was ever triggered.

A § 1983 plaintiff must allege more than a statutory basis for his claim; he must also allege facts which support the claim. Summary judgment is appropriate if "a party . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In order to show an entitlement under § 31-254, a prisoner must show that he is working pursuant to "a contract . . . with a private person, firm, corporation or association." Ariz. Rev.Stat. § 31-254(A). We agree with the district court that in *Hale,* "there is no evidence supporting a claim that the prison's authorization of the buckle shop constituted a contract as defined by the Arizona statute." Berry may not rely on § 41-1623(E), which does not require a contractual relationship with a private entity, because he is limited to prospective relief by the Eleventh Amendment and this statute has been repealed. Accordingly, we affirm the district court's grant of summary judgment on Berry's § 1983 claim for prospective relief against state officers.

VI

We conclude that the notice of appeal in *Fuller* was proper; that the Eleventh Amendment does not bar the prisoners' FLSA claim; that there is no employer-employee relationship between the prisoners and the state under the FLSA; that the State of Arizona, the DOC, and ARCOR are not "persons" within the meaning of 42 U.S.C. § 1983; that the claims for monetary damages against the individual officers are barred by the Eleventh Amendment; and that the district court in *Hale* properly granted summary judgment on the claim for injunctive relief un-

der § 1983 against the individual state officials. Both judgments are therefore AFFIRMED.

NORRIS, Circuit Judge, with whom Circuit Judge FLETCHER, joins, dissenting:

> [F]ree labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.

Whitfield v. Ohio, 297 U.S. 431, 439, 56 S.Ct. 532, 535, 80 L.Ed. 778 (1936).

Richard Berry worked at C/A Buckles, a business that employed about a dozen workers and produced belt buckles for groups such as the Marine Corps, U-Haul, and the University of Texas Longhorns booster club. Today, the majority holds that the State of Arizona is not required to pay Berry or his co-workers the federally-mandated minimum wage because they were inmates at the Arizona State Prison, working for a "prison-structured program" pursuant to Arizona's requirement that prisoners work at hard labor. In so holding, the majority removes by fiat a large, if ill-defined group of workers from the coverage of the Fair Labor Standards Act ("FLSA"), judicially creating an exemption not found in the statute.

In passing the FLSA, Congress sought to improve the standard of living workers across the land by outlawing substandard wages in all industries competing in interstate commerce, subject only to narrow and explicit exceptions. The majority adds an exemption for the prisoners in the case because they are forced to work, and in any case do not need to make a living wage. The majority ignores the obvious point that precisely for these reasons prisoners are unable to demand the minimum wage without the power of the law behind them. By focusing too narrowly on the technical legal relationship between the State of Arizona and Richard Berry, the majority slights Congress' major concern—barring the

products of sub-minimum wage labor from the channels of interstate commerce. When this case is understood in light of Congress' concern with the pernicious competitive effect of cheap labor, it becomes unnecessary to have any "particular sympathy for prison inmates" to conclude that the FLSA applies to prison labor. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1332 (9th Cir. 1991) (D.W. Nelson, J., dissenting).

I

By its own terms, the FLSA covers these Arizona prisoners. The Act says "[e]very employer shall pay to each of his employees . . . not less than $4.25 an hour." 29 U.S.C. § 206(a). The Act includes in its definition of "employee" any "individual employed by a State." 29 U.S.C. § 203(e)(2)(C). True to its conventional meaning, "employ" as used in the FLSA means "to suffer or permit to work," 29 U.S.C. § 203(g), which describes the obligation (or opportunity) the State of Arizona afforded Richard Berry. The statute lists a number of exemptions to its coverage, but prison labor is not on the list. *See* 29 U.S.C. § 213. Thus, under the plain language of the Act, the appellants are employees who must be paid at least $4.25 an hour.

The majority recognizes all this. It acknowledges that prisoners are not included on the statute's list of exemptions, and that " '[s]pecificity in stating exemptions strengthens the implications that employees not thus exempted . . . remain within the Act.' " Opinion at 1391 (*quoting Powell v. United States Cartridge Co.*, 339 U.S. 497, 517, 70 S.Ct. 755, 766, 94 L.Ed. 1017 (1950)). The majority cites approvingly Ninth Circuit case law making working prisoners employees for purposes of Title VII, and case law from other circuits interpreting the FLSA the same way. *Id.* at 1392. The majority also doffs its hat to the Supreme Court, acknowledging that the Court has "instructed [us] to interpret the term 'em-

ploy' in the FLSA expansively." Opinion at 1392 (*quoting Nationwide Mut. Ins. Co. v. Darden*, —— U.S. ——, ——, 112 S.Ct. 1344, 1350, 117 L.Ed.2d 581 (1992)). But after saying that the FLSA does not "categorically exclude" inmate labor, the majority nevertheless decides that prisoners working in programs "structured by a prison pursuant to state law requiring hard labor" are in fact excluded. *Id.* at 1391, 1397.

The first problem with the majority's holding is that it lacks any grounding in the statute. The crux of the majority's argument is that the FLSA does not apply because prisoners do not contract for their labor in a traditional bargained-for exchange, but are forced to work. *See* opinion at 1393-1394. While the statute expressly excludes from its definition of "employee" "any individual who *volunteers* to perform services for a public agency," 29 U.S.C. §203(e)(4) (emphasis added), it makes no special provision for those who are *forced* to work. Indeed, if being forced to work means "being subject to" work, then forcing the prisoners to work the state "suffers" them to do so. *See* Random House College Dictionary 1313 (rev. ed.). By the very terms of the FLSA, this means the state "employs" them. *See* 29 U.S.C. § 203.

Not just the text of the statute, but also Congress' goals in enacting the FLSA weigh heavily on the side of applying it to inmates. As the majority acknowledges, Congress' primary goal was to eliminate substandard labor conditions throughout the nation. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 509-10, 70 S.Ct. 755, 761-62, 94 L.Ed. 1017 (1950). Unlike the majority, however, Congress specifically recognized that substandard wages for any group of workers threaten the standard of living of others. Congress declared that

> the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-

> being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to *spread and perpetuate such labor conditions* among the workers of the several States; . . . [and] (3) *constitutes an unfair method of competition* in commerce.

29 U.S.C. § 202(a) (emphasis added). In other words, Congress understood that as part and parcel of its attempt to assure a minimum wage for all workers, it must eliminate from the channels of commerce goods produced at a subminimum wage.[1]

The congressional focus on unfair competition from cheap labor comports with common sense economics. Richard Berry and his fellow prison workers produce belt buckles that may be sold at prices that put downward pressure on prices charged by other producers of belt buckles, producers who must pay their workers at least $4.25 an hour. To compete, such producers must cut costs—by lowering wages to the minimum if they are not already there, by reducing other employee benefits, or by laying off workers. And because the elasticity of the demand for belt buckles is intrinsically limited, an increase in the supply of belt buckles produced by cheap inmate labor inevitably undercuts the bargaining power of the free workers Congress designed the FLSA to protect. In other words, the absence of a level playing field between prison and private sector belt-buckle producers will "spread and perpetuate" unemployment and substand-

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[1] I do not, as the majority claims, say that Congress' concern with unfair competition "controls" whether a person is an FLSA employee. Opinion at 1396, n. 14. What I do say is that Congress' concern with unfair competition is an important factor that should be considered in interpreting the statute. The question is not whether unfair competition is "an element of an action under the FLSA" (*id.*); of course it's not. The question is whether Congress' concern with the harmful effect that cheap labor has on the living standards of all workers should inform our interpretation of the statute.

ard labor conditions among workers in the private sector.[2] The reality of this competition is illustrated in the experience of an Arizona steel manufacturer with unfair competition from ARCOR. ARCOR submitted a bid in the private steel construction market for $30,000 less than his $78,900 price. The manufacturer complained that ARCOR should not "be competing against private business on private projects." He asked, "Where can I get guys to work for me at 50 cents an hour?"

The Supreme Court has expressly recognized Congress' concern with the harmful effects of cheap labor. In *Powell v. United States Cartridge Co.*, 339 U.S. at 509 n. 12, 70 S.Ct. at 763 n. 12, the Court observed that "one major means of spreading substandard labor conditions was recognized to be through the lowering of prices for goods produced under substandard conditions. . . ." Noting the "bold and sweeping terms" of the FLSA, *id.* at 516, 70 S.Ct. at 766, the Supreme Court refused to exempt employees of a federal government contractor from the FLSA. The majority today does not heed the Supreme Court's constant refrain that the FLSA is designed to prevent the "distribution of goods produced under substandard labor conditions, which competition is injurious to . . . commerce. . . ." *United States v. Darby*, 312 U.S. 100, 115, 61 S.Ct. 451, 457, 85 L.Ed. 609 (1941). *See also Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 37, 107 S.Ct 2694,

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[2] The United States has even protested the use of prison labor in goods produced outside our borders for export to our country on the ground that those cheaply-produced goods deny competing United States industries a "level playing field." *Acting Commissioner Outlines Strategy for Implementing Administration's Goals*, BNA Int'l Trade Daily, Mar. 4, 1993; *see also Customs to Block Tea, Socks Allegedly Made by Chinese Forced Labor*, BNA Int'l Trade Daily, July 13, 1992. In 1992, the United States and China signed a memorandum of understanding that bans Chinese prison-made goods from being imported into the United States. *U.S., China Sign Understanding Prohibiting Prison Labor Exports*, BNA Int'l Trade Daily, Aug. 10, 1992.

2700, 97 L.Ed.2d 23 (1987); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299, 105 S.Ct. 1953, 1960, 85 L.Ed.2d 278 (1985); *Maryland v. Wirtz*, 392 U.S. 183, 189, 88 S.Ct. 2017, 2020, 20 LEd.2d 1020 (1968).

The majority briefly acknowledges that "the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition." Opinion at 1395. Yet enigmatically, and in the very next breath, the majority shrugs off Congress' concern, declaring that

> nothing in the FLSA indicates that that fact alone should convert the relationship between prison and prisoner to one of employer-employees such that prisoners working on a program structured by the prison are entitled to a minimum wage.

Id. (footnote omitted). The majority's argument has several flaws, not the least of which is that it reads like *ipse dixit* rather than analysis. Although the FLSA says nothing about the relationship between prisons and prisoners, the Act's over-arching concern with unfair competition from cheap labor weighs in favor of interpreting the FLSA as covering prison workers who compete with workers in the private sector. To divine a contrary congressional intent from the FLSA's failure to mention prison labor explicitly is to turn the construction of the FLSA on its head. Courts have consistently presumed that workers are covered by the Act unless explicitly *excluded;* the majority presumes that prison workers are not covered unless explicity *included*. *See, e.g., Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388,, 391, 80 S.Ct. 453, 455, 4 L.Ed.2d 393 (1960).[3]

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[3] The traditional approach is compelled by the structure of the Act, which first states in broad terms at section 206 that employees must be paid the minimum wage, and then offers at section 213 certain exceptions to that rule—exceptions we must construe nar-

The majority's view that Congress apparently had little concern with the injurious effect of cheap prison labor on competition is inexplicable. The fact that prisoners are forced to work is irrelevant because the unfair competitive effect is the same regardless whether the worker is forced to work or free to work. Indeed, the less bargaining power workers have, the greater the need to apply the FLSA to protect them and those who compete against them. As the Supreme Court has explained, the FLSA was passed in

> recognition of the fact that due to the *unequal bargaining power* as between employer and employees, certain segments of the population required federal compulsory legislation to *prevent private contracts on their part* which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-07, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945) (emphasis added). The majority seizes upon the prisoner's lack of bargaining power as evidence that he is not an employee of the state. But it is exactly the worker who lacks bargaining power that the FLSA seeks to reach, for this is the worker who is most likely to be working for substandard wages and thereby "endanger[ing] national health and efficiency." *Id.* Congress understood that allowing any group of workers to make "private contracts" to work below the minimum wage tends to depress the wages or threaten the standard of living of other workers in competing industries. The fact that a prisoner may lack the choice not to work does not reduce the unfair competitive effect of his work product when it enters the channels of commerce.

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rowly. *See Arnold*, 361 U.S. at 392, 80 S.Ct. at 456. Section 213 makes no exception for prison workers. The majority recognizes this fact, *see* opinion at 1391, but concludes nonetheless that the FLSA does not apply to Berry and his fellow prison workers.

The majority's premise—that the relationship between prison and prisoner is somehow inconsistent with FLSA coverage—is equally peculiar. On the ground that a hard-time inmate's labor belongs to the institution, the majority holds that prisoners are not employees under the FLSA. Opinion at 1395. The majority provides no analysis explaining why the sterile concept of "belonging to the institution" should be the test of "economic reality." *See Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961) (" 'economic reality' rather than 'technical concepts' " determines whether there is an employment relationship under the FLSA). The economic reality is that Richard Berry and his fellow plaintiffs work. Their labor produces goods and services that are sold in the channels of commerce. And ARCOR pays them for their efforts. Common sense tells us this relationship is both penological *and* pecuniary. *Cf.* opinion at 1393-94. The majority fixates on whether the prisoners have a contractual right to bargain for their labor. This technical legal concept, unrelated to Congress' design in the FLSA, diverts the analysis from the economic *reality* of this case.

While the majority purports to reject Judge Trott's view that prisoners are categorically excluded from the FLSA, *see* opinion at 1391, it offers no principled basis for distinguishing prisoners who are covered by the FLSA from those who are not. The majority's holding thus "encourages unnecessary litigation and invites confusion in an area of the law that should be quite clear." *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.1993). The majority says, "While we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case, who worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, are not 'employees' of the state within the meaning of the FLSA." Opinion at 1388. First, the majority restricts its FLSA exemption to prisoners

who are forced to work. But, at least in Arizona, this restriction means little because the Department of Corrections may require *all* able-bodied prisoners to work at hard labor. Ariz.Rev.Stat. § 31-251(A). Second, the exemption is restricted to prisoners who work under "prison-structured" programs. However, "prison-structured" is so lacking in definition that it has no meaning as a limiting factor. Since, as the majority recognizes, prison authorities exercise virtually total control over prisoners' activities, including their work, opinion at 1393, any work program using inmate labor is presumably "prison-structured." Furtheremore, the majority points to nothing in the FLSA or its legislative history which would justify an exception that distinguishes between prisoners working in "prison-structured" programs from prisoners working in "non-prison-structured" arrangements. Thus, the standards limiting the exception the majority writes into the FLSA are both amorphous and ad hoc.

The majority's announcement of a previously undiscovered exemption to the FLSA conforms with neither the text nor the purpose of the statute. In exempting the prisoners, the majority does what the Supreme Court has previously refused to do: namely, "restrict the Act not only arbitrarily but also inconsistently with its broad purposes." *Powell*, 339 U.S. at 515, 70 S.Ct. at 765.

II

The majority attempts to buttress its cramped reading of the FLSA by arguing that Congress could not have intended the FLSA to cover prison labor because Congress' "concern with unfair competition on account of prison-made goods had been dealt with in the Ashurst-Sumners Act." Opinion at 4328 (sic). Ashurst-Sumners permits goods produced in pilot prison programs to be sold in interstate commerce provided prisoners are paid prevailing wages, less appropriate deductions. *See* 18 U.S.C. § 1761(c).

In accepting Arizona's argument that Congress intended Ashurst-Sumners to regulate the wages of prisoners to the exclusion of the FLSA, the majority ignores *Powell v. United States Cartridge Co.*, 339 U.S. 497, 70 S.Ct. 755, 94 L.Ed. 1017 (1950). In *Powell*, the Court considered, and rejected, a similar argument that Congress intended the Walsh-Healey Act to regulate the wages of the employees of government contractors, to the exclusion of the FLSA. Like Ashurst-Sumners, Walsh-Healey contains a prevailing wage requirement, but the Supreme Court rejected an argument that Congress intended the FLSA and Walsh-Healey to be mutually exclusive.

Like the Ashurst-Sumners Act, the Walsh-Healey Act, which was also passed shortly before the FLSA, regulates the wages of a narrowly defined class of workers. In comparing Walsh-Healey and the FLSA, the Court said:

> [L]anguage [in the FLSA] discloses a congressional awareness that the coverage of the Fair Labor Standards Act overlaps that of other federal legislation affecting labor standards. . . .
>
> Despite evidence that the two statutes define overlapping areas, respondents contend that they should be construed as being mutually exclusive. There has been no presentation of instances, however, where compliance with one Act makes it impossible to comply with the other. There has been no demonstration of the impossibility of determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both. . . .
>
> In some, and probably most, instances, the "prevailing minimum wages" required by the Walsh-Healey Act were more advantageous to employees than the minimum wages prescribed by the Fair Labor Standards Act. . . . On the other hand, the

> remedial procedure under the later Act was generally more advantageous to employees than the procedure under the earlier Act.
>
> We conclude that the Acts are not mutually exclusive. . . . We find the Acts to be mutually supplementary.

Powell, 339 U.S. at 518-20, 70 S.Ct. at 766-77 (footnote omitted).

This analysis in *Powell* applies with equal force here. The end result should be the same: Ashurst-Sumners and the FLSA are not mutually exclusive; they are mutually supplementary.[4]

The majority's reliance on Ashurst-Sumners creates an internal inconsistency in the opinion. If Congress intended Ashurst-Sumners and the FLSA to be mutually exclusive in regulating prison labor, as the majority holds, then *all* prison labor would be exempt from the FLSA.

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[4] The majority gives three reasons for disagreeing with my argument that the FLSA and Ashurst-Sumners are mutually supplementary, just as the Supreme Court in *Powell* found Walsh-Healey and the FLSA to be. *See* opinion at 1397-98, n. 18. None of the majority's reasons is responsive to my argument.

(1) The majority's first reason—that Walsh-Healey applies to "all persons employed" on government contracts, whereas the FLSA does not apply to these prisoners because they are not " 'employees' under the FLSA" (*id.*)—is circular. It assumes the answer to the very question of statutory interpretations we must decide.

(2) The majority's second reason—that Walsh-Healey and Ashurst-Sumners are mutually exclusive—is a red herring. The issue is not whether Ashurst-Sumners and *Walsh-Healey* are mutually exclusive, but whether Ashurst-Sumners and the *FLSA* are.

(3) Finally, applying the FLSA to prisoners would not, as the majority claims, render Ashurst-Sumners superfluous any more than applying the FLSA to employees of government contractors makes Walsh-Healey superfluous.

Yet the majority rejects this view. *See* opinion at 1389, 1392. Since the majority rejects the idea that the FLSA categorically excludes all prisoners. I fail to see how it can at the same time hold that the FLSA and Ashurst-Sumners are mutually exclusive.

In a final attempt to impute its own intent to the Congress, the majority says that Congress must have intended to exempt these prisoners from the FLSA because Congress would not have wanted to jeopardize prison labor programs. *See* opinion at 1398. Yet the majority fails to give any clue why possible congressional concerns about jeopardizing prison labor programs should trump Congress' clearly expressed intent that the FLSA be used as a shield to protect workers from the evils attending the sale of goods produced by cheap labor. The majority's willingness to sacrifice the wages of free labor in order to deny wages to inmates working in prison labor programs is not grounded in the text or legislative history of either Ashurst-Sumners or the FLSA.[5]

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[5] Nor, I would add, is it grounded in reality. The majority's concern that the FLSA does not expressly allow states to garnish a portion of prisoners' wages to pay the state for room, board, and victim compensation is misplaced. *See* opinion at 1398. Just because the FLSA does not provide for such payments does not mean that Congress intended to prohibit a state from taking deductions from a prisoner's earnings to cover these items. Indeed, the State of Arizona already provides for such payments whenever a prisoner receives at least the minimum wage. *See* Ariz.Rev.Stat. 31-254(E). It is inconceivable that Congress would make a state pay prisoners the minimum wage *plus* room and board, or prohibit a state from requiring prisoners to make payments to their victims out of their earnings. In fact, the statute recognizes that in certain circumstances a portion of a worker's wages may come in the form of employer-provided board and lodging. *See* 29 U.S.C. § 203(m).

CONCLUSION

The majority's analysis seems to boil down to the proposition that as long as Arizona law forces prisoners to work, the prisoners do not have to be paid. I simply fail to see the logical connection between the fact that the prisoners are forced to work and the question whether the FLSA applies. I see no reason to allow prison industries to compete unfairly in the marketplace by selling goods made by cheap inmate labor because some judges feel that prisoners should not be paid the minimum wage for work they are required to do. Neither a plain reading of the Fair Labor Standards Act, nor a faithful adherence to its goal of maintaining a minimum standard of living for workers generally, justifies such a result.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-15785, 89-15162

FELTON HALE and RICHARD S. BERRY,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; ARCOR ENTERPRISES, a subdivision of the state; JAMES RICKETTS, former director of the Arizona Department of Corrections; SAMUEL LEWIS, director of the DOC; MARILN WILKENS, director of Arizona Correctional Industries; THOMAS LESCAULT, director of ARCOR; DAVID TIERNEY, EARL COBB, THOMAS DONNELLY, HENRY EVANS, MARCUS ENGLEMEN, DELBERT HOUSEHOLDER, and RAY SHAFFER, members of the Board of Directors, ARCOR Enterprises,
Defendants-Appellees.

JOHN LEROY FULLER, *et al.*,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; ARCOR ENTERPRISES, a subdivision of the state; JAMES RICKETTS, former director of the Arizona Department of Corrections; SAMUEL LEWIS, di-

rector of the DOC; MARILN WILKENS, director of Arizona Correctional Industries; THOMAS LESCAULT, director of ARCOR; TONY WEST, DAVID TIERNEY, EARL COBB, THOMAS DONELLY, HENRY EVANS, MARCUS ENGLEMEN, DELBERT HOUSEHOLDER, and RAY SHAFFER, members of the Board of Directors, ARCOR Enterprises; RICHARD ORBERG, ARCOR Vice President of Operations; KENNETH VAN DE VEER, ARCOR Vice President of Business and Finance; JOHN F. WRIGHT, former interim CEO, ARCOR; JAMES KINSELLA, former ARCOR Vice President of Business and Finance; GILBERT EVANS, former ARCOR director of operations; RALPH CLUFF, ARCOR operations and control officer; MICHAEL ULLERY, former interim ARCOR operations and control officer,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona

Argued and Submitted March 14, 1990

Submission Withdrawn March 14, 1990

Resubmitted April 20, 1992

Decided June 24, 1992

Order Granting Rehearing En Banc
Sept. 16, 1992

Michael E. St. George, St. George & Reed, Tempe, Ariz., for plaintiffs-appellants.

June Ava Florescue, Asst. Atty. Gen., Phoenix, Ariz., for defendants-appellees.

Before: FLETCHER, PREGERSON, and D.W. NELSON, Circuit Judges.

D.W. NELSON, Circuit Judge:

Appellants in both *Hale* and *Fuller* are inmates in an Arizona penitentiary who work for Arizona Correctional Industries (hereinafter "ARCOR"), making products for sale in the outside world. They brought these actions against Arizona, ARCOR and prison officials, claiming that under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. (1989), they were entitled to be paid the federal minimum wage for their work. Appellants in both cases also sought relief under Ariz. Rev. Stat. § 31-254 and under 42 U.S.C. § 1983. The district court in *Fuller* dismissed appellants' suit, and the district court in *Hale* granted summary judgment for the defendants. We conclude that the inmates are entitled to receive a minimum wage for their work. Accordingly, we affirm in part, reverse in part, and remand both cases.

I. FACTUAL AND PROCEDURAL BACKGROUND

Inmates within the Arizona prison system have a statutory obligation to "engage in hard labor for not less than forty hours per week." Ariz.Rev.Stat. 31-251. About ten percent of the inmates satisfy this obligation by working for the ARCOR correctional industries program (known as ACI since 1987), which makes a variety of products for sale or use outside the prison. ARCOR consists of several divisions or "enterprises" which are all owned and run by ARCOR but which produce different products.

An ARCOR enterprise is "deemed a private enterprise and subject to all the laws and lawfully adopted rules of this state governing the operation of similar business enterprises elsewhere." Ariz.Rev.Stat. § 41-1623(D)(3).

We have consolidated two separate appeals from inmates in the ARCOR program: *Fuller* and *Hale*. The claims of 296 similarly-situated plaintiffs are consolidated in *Fuller*. All of those plaintiffs have appealed to this court. The appellants in *Fuller* work for a number of ARCOR enterprises and produce a wide variety of goods, from hogs for Farmer John meats to license plates. In order to work for the ARCOR program, appellants must apply to and be accepted by the prospective department or division and pass an institutional security review. All revenue from ARCOR enterprises is placed in a revolving fund, out of which ARCOR pays wages and expenses.

Berry, the only plaintiff in *Hale* who has appealed to this court, worked as a clerk and office manager for a business operated within a division of ARCOR.[1] The business was part of the ARCOR Inmate-Operated Business Enterprise ("IOBE") program. As the name suggests, selected inmates in the IOBE program organize and operate their own businesses under ARCOR's supervision. Workers are selected by the inmate-owner and then apply to the Department of Corrections ("DOC") for the right to work. The profits from the businesses belong to the inmate owners, and the businesses can be sold. The businesses market their goods to the private sector. The DOC monitors the businesses and exacts a portion of the profits along with a monthly rent. Inmate wages are paid to the DOC, which in turn pays the inmates by depositing the funds into their commissary accounts. Inmates are paid 50 cents an hour for their work.

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[1] While *Hale* was not a class action, numerous plaintiffs in positions similar to Berry joined in the action. Only Berry joined in this appeal, however.

The plaintiffs in both cases sued for minimum wages under Arizona law, the FLSA, and 42 U.S.C. § 1983. The district court in *Fuller* dismissed the FLSA claim because it found that it had no jurisdiction over the state on any claims for monetary relief under either state or federal law. The court retained jurisdiction, however, over the plaintiffs' claims for prospective relief against the state under section 1983.[2] The district court in *Hale* granted the defendants' motion for summary judgment. It found no employer employee relationship under the FLSA and no jurisdiction over state claims or retrospective federal claims because of the 11th Amendment. There was no request in *Hale* for prospective relief. The plaintiffs in both cases appealed, and we have consolidated the cases for purposes of this appeal.

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989). Whether an employer-emplyee relationship existed under the FLSA is a question of law. *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir.1983).

A dismissal under Fed.R.Civ.P. 12(b)(6) is reviewed de novo. *Kruso*, 872 F.2d at 1421. In reviewing a motion to dismiss, plaintiffs' factual allegations are taken as true and constructed in the light most favorable to the

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[2] Plaintiffs in *Fuller* sought declaratory and injunctive relief establishing that they were entitled to notice and a hearing before being deprived of their right to a minimum wage.

plaintiffs. *Love v. United States*, 915 F.2d at 1242, 1245 (9th Cir.1989).

III. NOTICE OF APPEAL

Fed.R.App.P. 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal. . . ." This requirement is jurisdictional and may not be waived. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285 (1988). Arizona contends that the notice of appeal in *Fuller* was defective because the caption did not list all 296 parties whose actions were consolidated below and that the notice in *Hale* was defective because not all the defendants below were listed in the caption. We find that both notices meet the requirements of Rule 3.

A. *Fuller*

On December 1, 1988, the district court filed a supplemental order consolidating 296 cases into *Fuller*. The caption of the notice of appeal in *Fuller* simply lists "JOHN LEROY FULLER Plaintiffs." However, the body of the notice reads: "Come now plaintiff consolidated in the captioned cause do hereby appeal." In *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1323 (9th Cir.1991), we construed language identical to that used in Fuller's notice of appeal to mean that *all* the consolidated plaintiffs were appealing:

> [A]ppellants in this case accurately listed the parties to the appeal by describing them as all plaintiffs consolidated below. There was no need for appellants to list each party individually, since appellees could have [dis]covered their identities by referring to records of the lower court proceedings. The policy behind Rule 3(c) thus was adequately served.

Gilbreath is dispositive here.

B. Hale

The notice of appeal in *Hale* names as defendants in the caption "STATE OF ARIZONA; ARCOR ENTERPRISES, a subdivision of the state; ARIZONA CORRECTIONAL INDUSTRIES, a subdivision of the state *et al.*" The body of the notice states that the "plaintiffs Berry and Berry . . . notice their appeal to the Ninth Circuit Court of Appeals of the judgment of December 8, 1988 dismissing their complaints. This appeal is taken as to all issues concluded with the judgment of the court." Neither in the caption nor the body of the notice did appellants list the individual defendants they had sued in the district court. However, Rule 3(c) does not require that *appellees* be listed, only *appellants*. Since only Berry is appealing, Rule 3 is satisfied.[3]

Appellants in both cases filed adequate notices of appeal.

IV. FAIR LABOR STANDARDS ACT

The FLSA governs the relationship between employers and employees. It requires employers to pay their employees a minimum wage of $4.25 per hour. 29 U.S.C. § 206(a)(1). The defendants contend that the FLSA does not apply to them for two reasons. First, they assert that the FLSA cannot apply to state governments under the Eleventh Amendment. Second, they claim that the inmates were not employees of the state within the meaning of the Act. We address each argument in turn.

A. Applicability of the FLSA to States

Arizona claims that the Eleventh Amendment bars any claim against it under the FLSA. However, Congress has

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[3] In any event, by taking an appeal "as to all issues" decided below, including the section 1983 claims brought only against the individual defendants, the plaintiffs in *Hale* provided sufficient notice to those defendants that the judgment in their favor was being appealed as well.

the power to override a state's Eleventh Amendment immunity in the exercise of its Commerce Clause power. *Pennsylvania v. Union Gas*, 491 U.S. 1, 14-15, 109 S.Ct. 2273, 2281, 105 L.Ed.2d 1 (1989) (plurality opinion); *see id.* at 57, 109 (S.Ct. at 2303 (White, J., concurring in the judgment). The question we face, therefore, is whether Congress intended to do so when it enacted the FLSA.

Congress overrides Eleventh Amendment immunity only when its intent to do so appears in "unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148, 87 L.Ed.2d 171 (1985). Congress has done so in this case. In 1985, the Supreme Court held that states were not immune from federal regulation of their "traditional state functions." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 546-47, 105 S.Ct. 1005, 1015, 83 L.Ed. 1016 (1985). In so doing, the Court overruled *National League of Cities v. Usery*, 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976), which had held the contrary. Shortly after the decision in *Garcia*, Congress amened the FLSA, giving states until April 15, 1986 to conform to the Act. 99 Stat. 787 § 2(c)(1) (1985). In the wake of this amendment, as we held in *Gilbreath*, "it is clear that the FLSA's protection now extends to state employees." 931 F.2d at 1324. If the inmates are state employees, therefore, they are protected by the FLSA.

B. Employer/Employee Relationship Under the FLSA

Appellants contend that they are in an employment relationship with the DOC and ARCOR as such a relationship is defined under the FLSA, and therefore that they are covered by the minimum wage requirements of that statute. The defendants advance two reasons why the FLSA does not apply in these cases. First, they claim that the FLSA does not apply to inmate employees at all.

Second, the defendants argue that even if inmates can be employees under the FLSA, no employer-employee relationship existed with these particular inmates.

1. Application of the FLSA to Prisoners

Appellees contend that the plaintiffs cannot be employees because the FLSA was not intended to cover prisoners. Appellees argue that the purpose of the FLSA was to maintin the "minimum standard of living necessary for health, efficiency and general well-being of workers." 20 U.S.C § 202(a). Because the inmates are cared for by the state, and because the inmates' work is a function of their incarceration and custody, appellees contend, the FLSA does not apply to them. Whether the FLSA applies to prisoners is an open question in this circuit.[4] Based on the purpose and structure of the FLSA and the decisions interpreting it and analogous statutes, we conclude that Congress intended to regulate prison labor.

We begin with the well-settled principle that when interpreting the FLSA courts are required to define "employer" and "employee" expansively and to construe exemptions narrowly. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 295-96, 105 S.Ct. 1953, 1958-59, 85 L.Ed.2d 278 (1985); *Goldberg v. Whitaker House Cooperative, Inc.,* 366 U.S. 28, 32, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961); *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947); *Real v. Driscoll Strawberry*

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[4] We have faced this precise question only once before, in *Gilbreath v. Cutter Biological, Inc.,* 931 F.2d 1320 (9th Cir.1991). In *Gilbreath,* Judge Trott's opinion concluded that the FLSA was not intended to apply to prisoners at all. 931 F.2d at 1324-25. Judge D.W. Nelson's dissent, on the other hand, concluded that the FLSA *was* intended to apply to prisoners. *Id.* at 1333-34 (D.W. Nelson, J., dissenting). Judge Rymer's concurring opinion expressly refused to reach the issue. *Id.* at 1328 n. 1 (Rymer, J., concurring in the result). Because there was no majority holding on the issue, we consider the question anew here.

Associates, Inc., 603 F.2d 748, 754 (9th Cir.1979). Indeed, given the "striking breadth" of the FLSA's definition of "employee," the Supreme Court has determinned that that term reaches some parties who may not traditionally be though of as employees at all. *Nationwide Mutual Ins. Co. v. Darden*, —— U.S. ——, ——, 112 S.Ct. 1344, 1349, 117 L.E-d.2d 581 (1992).

Next, we consider the structure of the FLSA. We conclude, that the way the Act was written suggests that Congress intended to include prisoners within the scope of the Act. In 29 U.S.C. § 213 (1982), Congress set forth an extensive list of workers who are exempted from the Act. The Supreme Court has consistently refused to exempt from coverage employees not mentioned in section 213, reasoning that "[s]uch specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517, 70 S.Ct. 755, 766, 94 L.Ed. 1017 (1950). Significantly, Congress did *not* exempt prisoners from the Act in section 213. The framework of the FLSA—a broad general definition of "employees" followed by several specific exceptions—"strongly suggests that Congress intended an all-encompassing definition of the term 'employee' to include all workers not specifically excepted." *Patel v. Quality In South*, 846 F.2d 700, 702 (11th Cir.1988), *cert. denied*, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 182 (1989).

Congress has modified section 213 on numerous occasions, but has never added prisoners to the list of those exempted. Under these circumstances, "it would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act." *Carter v. Dutchess Community College*, 735 F.2d 8, 13 (2nd Cir.1984).

Construing the FLSA to include inmate workers is also consistent with the purposes of the Act. Although provid-

ing a minimum standard of living is certainly one purpose of the Act, another equally important purpose was to eliminate unfair competition between employers and between workers seeking employment. 29 U.S.C. § 202 (a)(3). Congress intended to protect both private business and employees from being driven out of work by competing products made with cheap labor. Congress' recognition of the unfair competition that results from using low-paid *prison* labor is apparent in 18 U.S.C. § 1761. In that statute, Congress criminalized the transportation of prison-made goods in interstate commerce (with certain exceptions) unless the employer paid "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed." 18 U.S.C. § 1761(c)(1) (1984). Requiring that prisoners receive a minimum wage for their labor furthers that goal of preventing unfair competition.

Finally, prior decisions of this and other circuits bolster our conclusion that inmates can be employees under the FLSA. This circuit has held that a prisoner working in a prison library can be an employee of the prison for purposes of Title VII. *Baker v. McNeil Island Correction Center*, 859 F.2d 124, 128 (9th Cir.1988). Although the FLSA and Title VII are different statutes, "cases construing the definitional provisions of [Title VII] are persuasive authorities when interpreting [the FLSA or the ADEA]" because the definition of "employee" in the three Acts is virtually identical. *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2nd Cir.1986). In *Baker*, we concluded that the high degree of control exercised in the prison context made it more, not less, likely that the prisoner was an employee of the prison. 859 F.2d at 128. Moreover, *Baker* specifically rejected the argument, advanced again here, that inmate work assignments were not employment relationship because they "are more in the nature of rehabilitation and employment

training than in the nature of commercial employment." *Id.*

The Second and the Fifth Circuits have both concluded that the FLSA can apply to inmates in some circumstances. In *Carter v. Dutchess Community College*, 735 F.2d 8, 15 (2nd Cir.1984), the Second Circuit "emphatically" held that "the fact that [Carter] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA." *Id.; see also Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir.1990) ("We agree with the *Carter* court that status as an inmate does not foreclose inquiry into FLSA coverage").

In light of the purpose of the FLSA, the structure of that Act and the Supreme Court and circuit precedent interpreting it and analogous statutes, we conclude that Congress did not intend automatically to exclude inmate employees from the protections of the Act. We next consider whether the inmates in the cases before us were in an employment relationship with ARCOR.

2. The Existence of an Employment Relationship

a. The Legal Standard

Whether an employment relationship exists under the FLSA depends on the "economic reality" of the employment situation. *Goldberg*, 366 U.S. at 33, 81 S.Ct. at 936. This circuit, in deciding if an employer/employee relationship exists, has applied an "economic reality" test which looks to four factors: whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir.1983). The evaluation of the

relationship as a whole, however, depends not on isolated factors but "upon the circumstances of the whole activity." *Rutherford Food*, 331 U.S. at 730, 67 S.Ct. at 1477. The *Bonnette* factors "are not etched in stone and will not be blindly applied." *Bonnette*, 704 F.2d at 1470. As a result, failure to satisfy one of the factors is not automatically fatal to a worker's claim.

Two prior cases in this circuit have applied the "economic reality" test in the prison context. In *Baker*, we concluded that Title VII can apply to prison inmates. 859 F.2d at 128. Central to this conclusion was our determination that "the most important factor—the extent of the employer's right to control the means and manner of the worker's performance—strongly suggests because of the prison context that the plaintiff was an employee." *Id.* In other words, the high degree of control exercised by the prison over the inmate made it more likely that an inmate working for the prison was an employee.

In *Gilbreath*, we again considered the "economic reality" test as applied to inmates. There, members of this court expressed three widely divergent views on the question of when a prisoner is an employee. In an alternative holding,[5] Judge Trott concluded that the DOC was not an employer because it had *too much* control over the prisoners. He explained: "The state's absolute power over appellants is a power that is not a characteristic of—and indeed is inconsistent with—the bargained-for exchange of labor which occurs in a true employer-employee relationship." 931 F.2d at 1325.

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[5] As noted *ante*, Judge Trott concluded that the FLSA did not apply to prisoners at all. He nonetheless proceeded to apply the "economic reality" test to the facts of that case. Rather than drawing a conclusion applicable to those facts, however, Judge Trott concluded that "[t]he results of such application reveal why the FLSA itself cannot be said to cover prison labor . . . ." *Gilbreath*, 931 F.2d at 1325.

Judge Rymer's concurrence recognized that the determination of an employment relationship between prisons and inmates must be considered on a "case by case" basis. *Id.* at 1331 (Rymer, J., concurring in the judgment). Judge Rymer determined that the DOC met the four *Bonnette* factors in that case: it had the power to hire and fire inmate workers, it had ultimate responsibility for hiring inmates and for paying them, and their work was performed within the prison and therefore was under at least partial supervision by prison employees. *Id.* at 1330.[6] Nonetheless, Judge Rymer concluded that the DOC was not an employer because "[t]he relationship between prison and prisoner was entirely custodial, bearing none of the indicia of a traditional employment relationship such as the exercise of discretion and exchange of wages for labor." *Id.* at 1331. She also concluded that paying inmates subminimum wages would not result in unfair competition with outside workers because the labor product in that case "belongs to the institution." *Id.*[7] Judge Rymer apparently went beyond the *Bonnette* factors, finding three other considerations important: whether low inmate wages would create unfair competition, whether the prison exercised its discretion in choosing workers, and whether the prison received labor in exchange for wages. Those considerations led her to find no employment relationship in *Gilbreath* because the DOC acted merely as a conduit between inmates and a private firm (Cutter Biological).

Finally, Judge D.W. Nelson's dissent applied the four factors set forth in *Bonnette*. Judge Nelson concluded that those factors were met in *Gilbreath*, and therefore that the DOC was an employer. *Id.* at 1335 (D.W. Nel-

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[6] It was not clear from the record in *Gilbreath* who kept employment records.

[7] The *Gilbreath* opinions are silent on what, if any, product the inmates helped produce, and on who purchased or used that product.

son, J., dissenting). Judge Nelson rejected Judge Trott's argument that the DOC had too much control over the inmates on the grounds that it was inconsistent with *Baker*, and rejected Judge Rymer's focus on the three new factors as inconsistent with the purposes of the FLSA.

The guidance we are given by these widely divergent opinions is not entirely clear. On the one hand, *Gilbreath* could stand for the proposition that because prisons exercise such complete control over their inmates, a court applying the economic reality test can *never* find inmates to be employees. *See id.* at 1325 (Trott, J.). Of course, that sweeping conclusion commanded only one vote in *Gilbreath*. Even more problematic, such a conclusion would put *Gilbreath* squarely in conflict with *Baker*, which not only held that inmates *could* be employees but also reasoned that the high degree of control in the prison context made it *more*, not less, likely that inmates were employees. *See Baker*, 859 F.2d at 128.[8] When presented with such a conflict, we must distinguish the two cases if at all possible; if it is impossible, we must call for en banc review. *Atonio v. Wards Cove*

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[8] Judge Trott distinguished *Baker* on the grounds that it dealt with Title VII, not the FLSA. *Gilbreath*, 931 F.2d at 1325. The two acts have essentially identical definitions of "employee," however. To distinguish *Baker* on this ground would put this circuit in direct conflict with the Second Circuit, and would run contrary to the reasoning of the Supreme Court. *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2nd Cir.1986); *cf. Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723, 67 S.Ct. 1473, 1473, 91 L.Ed. 1772 (1947) (National Labor Relations Act definition of employee, which is virtually identical to FLSA's definition, is authority for determining coverage of FLSA). As Judge Rymer reminds us, "we are to avoid creating intercircuit conflict when possible." *Gilbreath* 931 F.2d at 1328 n. 1 (Rymer, J., concurring in the judgment); *see United States v. Gwaltney*, 790 F.2d 1378, 1388 n. 4 (9th Cir.1986), *cert. denied*, 479 U.S. 1104, 1107 S.Ct. 1337, 94 L.Ed.2d 187 (1987).

Packing Co., 810 F.2d 1477, 1478-79 (9th Cir.1987) (en banc).[9]

We conclude that the appropriate reading of *Gilbreath* is one which adopts Judge Rymer's conclusion that the existence of an employment relationship must be determined on a case-by-case basis. When neither a single opinion nor a single line of analysis commands the support of the majority of a panel, the holding of the case is "that portion taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.E.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)). Judge Rymer's opinion decides the case on the narrowest grounds possible, because it requires a case by case analysis rather than drawing a categorical conclusion. Further, Judge Rymer's opinion avoids a conflict with *Baker*, since it does not hold that inmates can never be employees and does not focus on the level of control exercised by the prison. We therefore proceed to a case-by-case application of the *Bonnette* factors. In addition, because *Bonnette* does not purport to provide an exhaustive list of factors, we will consider as well those factors Judge Rymer found significant in *Gilbreath*.

b. Fuller

The inmates in *Fuller* all work in the ARCOR program, which is run by the DOC. The state through the ARCOR program has the undisputed power to hire and fire the inmates. Further, ARCOR and the DOC are solely responsible for supervising and controlling inmate work schedules and conditions of employment. The DOC also determines the rate and method of payment, is ac-

[9] To take the opposite course—to follow Judge D.W. Nelson's dissent—would give no effect to the result reached by a majority of the *Gilbreath* panel.

tually responsible for paying the inmates, and maintains whatever employment records exist. The four factors traditionally associated with the economic reality test are therefore met in this case. *See Bonnete,* 704 F.2d at 1470.

We turn next to the three considerations identified by Judge Rymer. The first factor suggesting an employment relationship is the risk of unfair competition posed by workers in a particular case. That risk is present here. The ARCOR program produces products for competition with private industry as well as products for state use only. For example, inmates in the ARCOR program produce goods for the private sector, such as hogs for Farmer John meats in California, steel bed frames and mattresses. They also produce goods for state and local governments, such as license plates and printed forms, some of which are sold to states other than Arizona. Under these circumstances, it certainly cannot be said that the products pose no risk of unfair competition with private employers. To the contrary, the inmates in ARCOR appear to be in direct competition with farmers and producers of beds and mattresses in the outside world. Because of their low wage rates, the ARCOR industries have an unfair advantage in that competition.

The second concern expressed by Judge Rymer is whether the employer and the employee can exercise discretion in the relationship. That factor too is present here. In order to obtain an ARCOR position, an inmate must apply for a particular position, the ARCOR division must have space available and must find the inmate acceptable, and the DOC must approve the inmate as a low security risk. The inmate has discretion both in deciding whether to apply to ARCOR at all [10] and in choosing

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[10] Although all inmates in the Arizona prison system must work in some capacity, only about ten percent of Arizona inmates work in the ARCOR program. The rest do institutional work for the prison itself.

a division for which he wishes to work. In turn, ARCOR has discretion not to hire an inmate either because it has no suitable positions available or because it believes the inmate is unqualified. Discretion in the creation of the employment relationship clearly exists in this case.

The final factor Judge Rymer found significant, the "exchange of wages for labor," *Gilbreath*, 931 F.2d at 1331, is present here as well. In *Gilbreath*, the inmates were working directly for a private company. Although they were paid by the DOC, the DOC was merely acting as a conduit for their wages, which ultimtely were paid by the private company. Judge Rymer's opinion concluded in that case that the DOC was not exchanging wages for labor with the inmates. In *Fuller*, by contrast, ARCOR employs the inmates directly. The inmates provide labor to ARCOR which is used to make goods which ARCOR sells. The inmates are paid by ARCOR out of its profits from the sale of those goods. Unlike the DOC in *Gilbreath*, ARCOR in thic case "purchases" inmate labor directly.

All the factors identified in *Bonnette* suggest that the inmates in *Fuller*, who work directly for ARCOR enterprises, are in an employment relationship with ARCOR. The considerations raised by Judge Rymer in applying *Bonnette* to the prison context also point towards an employment relationship in this case. That relationship is subject to the provisions of the FLSA. We conclude that the district court in *Fuller* erred in dismissing the plaintiffs' FLSA claims.

c. Hale

In *Hale*, the appellant worked for an inmate-owned business operated under ARCOR's IOBE program that sold belt buckles in interstate commerce. Appellant argues that he was employed by the state because the DOC effectively controlled the business. Again, we consider each of the factors enumerated above.

The first *Bonnette* factor, ability to hire and fire employees, seems to suggest an employment relationship. Although it is true that the inmate owners select who they want to hire and fire, they can do so only with ARCOR and DOC approval. The DOC regularly exercised its control over inmate selection. DOC's power to fire an inmate without any approval from the IOBE owner suggests that the inmate owner's role is advisory rather than controlling. The first factor is met, therefore, because the DOC effectively controlled the hiring and firing of IOBE workers.

Whether the second factor, control over work schedules and conditions of employment, is met is unclear. On the one hand, the inmate owners themselves operate under the close supervision of the DOC. The on-site ARCOR employee known as the Business Manager manages all inmate operated business enterprises. The warden and the ARCOR business manager must approve all IOBE applications. All contracts between an IOBE and a third party are reviewed by the ARCOR manager and all business shipments are processed through the ARCOR manager. Finally, the DOC monitors inmates while they work not only for security reasons, but also to assure that they are working on their assignments. On the other hand, it is clear that the day to day operations of the business, such as ordering, advertising, manufacturing and shipping, are run by the inmate owner himself, not by ARCOR. Moreover, an inmate employee contracts with the inmate owner directly, not with ARCOR, and the owner ordinarily sets the hours and the general terms of employment.

The third factor, the paying of wages, militates in favor of finding an employment relationship. The DOC pays the inmate worker the wages owed by the owner. Although the DOC is merely passing wages paid by the inmate owner on to the inmate workers, Judge Rymer found in *Gilbreath* that such a relationship was sufficient

to meet this factor. Furthermore, the DOC must approve the amount the inmates are paid, and ARCOR monitors the finances of all IOBE businesses. Finally, the DOC takes a percentage of the gross sales of the IOBE business as "rent." This factor favors the characterization of the inmate-ARCOR relationship as an employment relationship.

The fourth *Bonnette* factor is whether the putative employer keeps employment records. It is unclear from the record who, if anyone, maintains such records. This factor is therefore ambiguous.

Judge Rymer's opinion in *Gilbreath* also looks at whether an inmate's employment at substandard wages presents a risk of unfair competition. In this case, Berry —the plaintiff in *Hale*—was employed by an IOBE which made belt buckles and sold them in interstate commerce. The labor product did not "belong to the institution"; it was introduced into outside commerce in direct competition with other goods. Such a risk does exist in this case.

Next, Judge Rymer found significant whether ARCOR and the inmates exercise discretion in choosing to enter the employment relationship. This factor also bolsters the conclusion that the parties are in an employment relationship, albeit less strongly than it did in *Fuller*. The *Hale* inmates can exercise their discretion in choosing to work for an IOBE, and in choosing to which IOBE they wish to apply. IOBE owners have some power to accept or reject employees. As we noted above, however, this "power" is largely advisory, and it is ARCOR which possesses most of the discretion, particularly in firing inmates.

Judge Rymer's final indicator of an employment relationship is the exchange of labor for wages. This factor counsels against finding an employment relationship. Inmates are paid solely out of the profits of the IOBE, and

the DOC merely acts as a conduit, passing money from the IOBE to the inmate workers. Thus, the value of the inmates' labor benefits the IOBE owner rather than ARCOR or the DOC. Although the DOC does take a percentage of the IOBE's profits out as "rent," and therefore receives some of the value of the inmate labor, the inmates are not working directly "for" ARCOR or the DOC, but for the inmate owner.

ARCOR's relationship with the inmates in this case falls somewhere in between *Fuller* and *Gilbreath*. Unlike *Fuller*, there is no one unified entity performing all the traditional functions of an employer. Unlike *Gilbreath*, however, the intermediary between ARCOR and the inmates is not an independent private company, but rather an IOBE under the ultimate control of ARCOR itself. We conclude that the plaintiff in *Hale* was an employee of ARCOR. The most important factors—the hiring and firing of employees, the paying of wages, and the risk of unfair competition—all point to an employment relationship. Further, even in those factors which are ambiguous, such as the day-to-day control over working conditions, ARCOR exercises a strong degree of control. ARCOR is the entity ultimately responsible for determining whether an inmate has a job, and the circumstances under which that job is performed. We therefore conclude that ARCOR is an employer for purposes of the FLSA.

Even were we to conclude that ARCOR alone was not an employer, however, we would reach the same result, because we conclude that the IOBE is not an independent entity, but rather a subsidiary of ARCOR under its direct day-to-day control. In addition to the elements of control identified above—ARCOR's and DOC's control over hiring and firing, the routine intervention of the ARCOR Business Manager, and the fact that ARCOR serves as a financial conduit for the IOBE and audits its books—appellants point to many indicia of control to prove that the state controls the IOBEs. All contracts of

any kind between an IOBE enterprise and another company are reviewed by the ARCOR business manager. An IOBE can only operate in fields designated by ARCOR, and IOBEs must be approved by the DOC as well. An IOBE's legal status is as a subsidiary: they were "formed as a unit of Arcor Enterprises." An inmate can only become an IOBE owner with approval of the warden, and the warden, the ARCOR manager or its Board can suspend the business for any or no reason. The warden and ARCOR business managers must approve all IOBE employment applications. Finally, all equipment and supplies are registered as owned by the DOC, and the number of workers an IOBE may employ is limited by the DOC.

The great control ARCOR and the DOC exercise over the IOBEs indicates that the IOBEs are not separate entities but rather are arms of ARCOR itself. Since ARCOR and the IOBEs are in essence a single entity, "the characteristics of each [can] be aggregated to show that that single entity [is] an employer." *Gilbreath*, 931 F.2d at 1329 n. 2 (Rymer, J., concurring in the judgment). Treated as a single entity, ARCOR and the IOBE certainly meet all of the factors set out in *Bonnette* and *Gilbreath*, and constitute employers subject to the provisions of the FLSA. We conclude that the district court erred in granting summary judgment in *Hale*.

V. ARIZONA LAW

Appellants in both *Hale* and *Fuller* also sought relief under an Arizona statute which they argue creates an obligatory duty to pay inmates minimum wages. Ariz. Rev.Stat. § 31-254. Both district courts dismissed the state claims on the grounds that they were barred by the Eleventh Amendment. In *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), the Supreme Court held that the Eleventh Amendment deprives federal courts of jurisdiction to

order state actors to comply with state law. As the Court stated, "[i]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106, 104 S.Ct. at 911; *see also Gilbreath*, 931 F.2d at 1327. Appellants' state law claims are barred by the Eleventh Amendment.

VI. SECTION 1983 CLAIMS

Appellants argue that Ariz.Rev.Stat. § 31-254 creates a property interest in minimum wages which the state cannot deny without due process of law. By failing to afford them notice and a hearing before depriving them of minimum wages, appellants argue, the defendants have denied them due process. They seek relief under 42 U.S.C. § 1983, which provides a cause of action to plaintiffs whose federal rights are denied "under color of state law." The plaintiffs in *Fuller* sought both damages and declaratory and injunctive relief against the state, ARCOR, and officials of both state and ARCOR. The plaintiffs in *Hale* sought only monetary relief against the defendants. The district courts in both *Hale* and *Fuller* denied appellants' request for damages on the basis of the Eleventh Amendment. The court in *Fuller* found that Ariz.Rev.Stat. § 31-254 did create a property interest in wages. It retained the case "in the limited sense that if plaintiffs succeed on this claim the court may grant prospective-injunctive or declaratory relief." The court in *Hale* did not recognize a property or liberty interest created by state law.

A. Amenability of Defendants to Suit

Appellees argue that the court need not reach the merits of the section 1983 claim because they are immune from suit under section 1983. As to state of Arizona itself, this is unquestionably true. The Supreme Court held in *Will v. Michigan Dept. of State Police*,

491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) that a state is not a "person" amenable to suit under section 1983. This rule extends to "arms of the state." *Id.* at 70, 109 S.Ct. at 2311; *Gilbreath*, 931 F.2d at 1327. Insofar as they are directed against the state itself or the DOC, therefore, appellants' claims for both damages and injunctive relief must fail.

On the other hand, the individual defendants may be sued both for injunctive relief and for damages in their individual capacity, even though they are officers of the state and even if they were acting in their official capacity when they performed the acts complained of. *See Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358, 362-63, 116 L.Ed.2d 301 (1991) (state officers acting in their official capacity may be sued for damages in their individual capacity under section 1983); *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974) (state officials may be sued in federal court for prospective, nonmonetary relief). The Court in *Hafer* rejected the argument that "imposing personal liability on state officers may hamper their performance of public duties," concluding that neither the Eleventh Amendment nor the terms of section 1983 itself barred such suits. 112 S.Ct. at 364-65.

A more difficult case is presented by ARCOR. If it is an "arm of the state," then it cannot be sued under section 1983. *Will*, 491 U.S. at 70, 109 S.Ct. at 2311. Appellants argue that the action is not barred because ARCOR and its funding are independent from the state. We consider the following factors in determining whether an entity is independent of the state: "whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue and be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198,

201 (9th Cir.1988), *cert. denied*, 490 U.S. 1081, 109 S.Ct. 2102, 104 L.Ed.2d 663 (1989). "To determine these factors, the court looks to the way state law treats the entity." *Id.* at 201.

Arizona intended ARCOR to be self-sufficient. Arizona law provides that "Arizona Correctional Industries shall defray its costs, on an accrual basis, out of receipts from the sale of articles and products." Ariz.Rev.Stat. § 41-1629(C). All profits from ARCOR enterprises are deposited in a revolving fund separate from the state's general fund. Ariz.Rev.Stat. § 41-1629(D) (1989). All costs for the correctional industries are paid from this fund. Ariz. Rev.Stat. § 41-1624(A).[11]

There is nothing in the record indicating whether a judgment could be completely satisfied from money held in this revolving fund. However, absolute certainty that damages will not be paid from state funds has never been a prerequisite to permitting a suit against a government agency. *Travelers Indem. Co. v. School Bd. of Dade County*, 666 F.2d 505, 509 (11th Cir.1982) ("Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' *must* under all circumstances, be paid out of state funds."), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74 (1982); *see Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974) (suit barred by the Eleventh Amendment where there was a "virtual certainty" that damages would be paid from state funds). The first *Mitchell* factor, therefore, weighs in favor of the conclusion that ARCOR is independent of the state.

The second factor in the *Mitchell* test also militates in appellants' favor. Although the prison system itself is certainly performing a central government function, it is

[11] At the time this suit was brought, inmates' wages could not be paid with state general fund monies. Ariz.Rev.Stat. § 41-1624 (A)(2) (since amended).

difficult to see what central government function is being undertaken by a state-run factory or commercial enterprise, particularly one which by law is "deemed a private enterprise". Ariz.Rev.Stat. 41-1623(D)(3).

The last three factors seek to determine whether the entity has legal power in its own name. As applied to ARCOR, these factors are inconclusive. ARCOR has the power to purchase supplies and to pay all obligations. Ariz.Rev.Stat. § 41-1622. Further, ARCOR has its own budget and annual report. Ariz.Rev.Stat. § 41-1623(H), (I). However, it also appears that only the DOC is empowered to enter into contracts. Ariz.Rev.Stat. § 41-1623.

Finally, given the importance under the *Mitchell* test of how state law treats an entity, it is significant that Arizona law provides that ARCOR is "deemed a private enterprise." Ariz.Rev.Stat. § 41-1623(D)(3). Balancing all of these factors, it seems clear that Arizona intended ARCOR to operate as a private, profit-oriented commercial enterprise independent of state government. Under these circumstances, we conclude that ARCOR is not an "arm of the state" and is therefore amenable to suit under section 1983.

B. Deprivation of Due Process

Finally, we turn to the merits of appellants' claims against ARCOR and the individual defendants. There is no question that inmates have a property right to receive a minimum wage. In *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (en banc), we concluded that Arizona law was "unambiguous" in requiring that prisoners be paid at least a minimum wage, relying on Ariz.Rev. Stat. §§ 31-254 and 41-1624.01. We held in *Piatt* that due process required that Arizona prisoners be given a "meaningful" predeprivation hearing before being deprived of this minimum wage. 773 F.2d at 1036; *see also Gilbreath*, 931 F.2d at 1327 (same). Appellants in this case

alleged that they were denied such a hearing, and the defendants do not appear to contest this allegation. The district court in *Hale* erred in refusing to recognize this right. The district court in *Fuller* correctly denied summary judgment as to appellants' claim for prospective relief. Both courts correctly granted summary for the state of Arizona on the damages claim, but erred in granting summary judgment on the damages claims in favor of ARCOR and the individual defendants. Appellants in both cases are entitled to pursue the remaining claims on remand.

CONCLUSION

The district court's decision in *Hale v. Arizona*, No. 88-15785, granting summary judgment on plaintiff's FLSA claims is REVERSED. Its dismissal of plaintiff's state law claims is AFFIRMED. Its grant of summary judgment on plaintiff's section 1983 claim for monetary damages is REVERSED as to all parties except the state of Arizona and the DOC.

The district court's decision in *Fuller v. Arizona*, No. 89-15162, dismissing plaintiffs' FLSA claims is REVERSED. Its dismissal of plaintiffs' state law claims is AFFIRMED. Its denial of summary judgment on plaintiffs' section 1983 claims seeking injunctive and declaratory relief is AFFIRMED, but its grant of summary judgment on plaintiffs' section 1983 claims seeking damages is REVERSED as to all parties except the state of Arizona and the DOC.

Appellants shal recover their costs on appeal. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FLETCHER, Circuit Judge, dissenting:

With great reluctance, I dissent. The two cases before us are controlled by *Gilbreath v. Cutter Biological*, 931 F.2d 1320 (9th Cir.1991), a case which also presented the issue of whether inmates in the Arizona prison system were entitled to be paid the minimum wage. Judge Rymer's concurrence in *Gilbreath*, which the majority correctly identifies as the holding in the case, precludes a finding that the inmates in the two cases before us are covered by the FLSA.[1]

In *Gilbreath*, the Arizona DOC and a private entity each had some of the characteristics we identified with "employer" status in *Bonnette v. California Health and Welfare Agency*, 931 F.2d 1465 (9th Cir.1983). However, Judge Rymer found neither entity was an "employer" within the meaning of the FLSA. Most significant here is her discussion of the role of the DOC. Judge Rymer emphasized that the relationship between a prison and an inmate is in its very nature far different from a traditional employer employee relationship, because "inmate labor belongs to the institution." *Gilbreath*, 931 F.2d at 1331 (Rymer, J., concurring). She noted there was "no evidence that the DOC had a pecuniary, rather than penological, interest in inmate labor." *Id.* at 1330. She also made the point that where the inmates are employed by the prison itself, " '[there is no] fear of "upsetting the desired equilibrium in the work place", because the "work

[1] Judge Rymer did not join Judge Trott's conclusion that inmates can never be employees for FLSA purposes, finding that on the facts of *Gilbreath* an employer/employee relationship did not exist. *Gilbreath*, 931 F.2d at 1328 n. 1. (Rymer, J., concurring). Judge Rymer's opinion appears to leave some room for possible FLSA coverage for inmates in situations where prisoners might be on work release or otherwise working outside prison walls or in a position to compete with non-inmate workers for jobs. *See id.*, 931 F.2d at 1330. Those circumstances were not present in *Gilbreath*. I, too, find it unnecessary to reach this issue in our cases, because they also can be resolved on factual grounds.

place" [is] the prison itself.' " *Id.* at 1331 (citing *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir.1990). All of these reasons, in her view, precluded a finding that the FLSA applied to inmates working for the DOC within the walls of Arizona prisons.

In the majority's analysis of whether an employer-employee relationship exists in the two cases before us, the same Arizona DOC plays a significant role. In *Fuller*, the inmates work for ARCOR, which is run by the DOC. In *Hale*, the inmates work for ARCOR and for the IOBEs, which are themselves subsidiaries of ARCOR. It is difficult to see how the DOC's interests in *Hale* and *Fuller* are different from those Judge Rymer identified in *Gilbreath*, even if some of the employer supervisory, decisionmaking or recordkeeping functions are distributed somewhat differently. The majority does not succeed in escaping Judge Rymer's conclusion that the labor of Arizona prison inmates, employed by and within the prison system, "belongs to the institution."

In its effort to distinguish *Gilbreath*, the majority notes that the inmates in *Hale* and *Fuller* produce goods that compete in the marketplace with privately produced goods. However, Judge Rymer's focus was not on the possibility of unfair competition in the products marketplace, but in the market for labor. Because the inmates worked in an entirely different setting than non-inmates, she saw prison labor as no threat to " 'the standard of living and general well being of the worker in American industry.' " *Gilbreath*, 931 F.2d at 1331 (Rymer, J., concurring) (quoting *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir.1983) (per curiam)). Because Hale and Fuller are, like Gilbreath, inmates, working within the prison walls, their cases cannot be distinguished on this point.

I share the majority's evident disagreement with the outcome in *Gilbreath*. However, it is the law of this court, and it is dispositive in this case. Thus, I dissent.

ORDER

Sept. 16, 1992

Before: WALLACE, Chief Judge, BROWNING, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, D.W. NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, RYMER, T.G. NELSON, and KLEINFELD, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 86-2034 PHX RCB (MS)

JOHN LEROY FULLER, *et al.*,
Plaintiffs,

vs.

STATE OF ARIZONA; ARCOR ENTERPRISES; ARIZONA CORRECTIONAL INDUSTRIES; JAMES RICKETTS; SAMUEL LEWIS; MARILYN WILKINS; THOMAS LESCAULT; TONY WEST; DAVID TIERNEY; EARL COBB; THOMAS DONNELLY; HENRY EVANS; MARCUS ENGLEMEN; DELBERT HOUSEHOLDER; RAY SHAFFER; RICHARD ORBERG; KENNETH VAN DE VEER; JOHN F. WRIGHT; JAMES KINSELLA; GILBERT EVANS; RALPH CLUFF; and MICHAEL ULLERLY,
Defendants.

MEMORANDUM AND ORDER

[Filed Aug. 3, 1969]

Defendants filed a motion a motion to dismiss plaintiffs' consolidated complaints pursuant to Fed. R. Civ. P. 12(b)(6). Following the original filing of the motion, plaintiffs acquired counsel to represent them in this matter. Following a full briefing schedule on this motion which included a response, reply, amended response, reply to amended response, and supplement to amended response, the parties agreed to apply these same papers to plaintiffs' recently filed First Amended Complaint. The parties further declined to conduct oral argument on de-

fendants' motion to dismiss. After a careful review of the numerous documents, the court now rules.

FACTS

Plaintiffs are inmates working in jobs provided by a prison industries program commonly referred to as "ARCOR." In their First Amended Complaint, plaintiffs seek to recover minimum wages for labor performed in this program. Specifically, plaintiffs alleged claims for relief under: (1) 42 U.S.C. § 1983;[1] (2) the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (1982); and (3) A.R.S. § 31-254 (West Supp. 1987) and A.R.S. § 23-355 (West Supp. 1987). Thess three causes of action are directed at all named defendants.

(1) FAIR LABOR STANDARDS ACT ANALYSIS

Plaintiffs claim that they are entitled to minimum wages, pursuant to the provisions of the FLSA, for the

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[1] The court notes that plaintiffs included a separate § 1983 action in their First Amended Complaint. Since this claim was filed after the matter was briefed for the court, memoranda presently before the court fail to specifically address this cause of action. Nonetheless, the court will consider defendants' motion to dismiss as directed at all three claims because defendants consented to plaintiffs' motion to amend their complaint, declined to supplement their briefs, and because the § 1983 claim is inextricably linked with plaintiffs' federal and state law claims. Plaintiffs base their § 1983 cause of action on the decision in *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc). The *Piatt* court held that if a prisoner meets the requirements of an Arizona statute mandating wages for prisoners who perform work for private parties under contract with the Department of Corrections, then the state cannot deprive the inmate of this "liberty" interest without due process of law. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011, 1017, 25 L. Ed. 2d 287 (1970)). Obviously then, the viability of any claim under § 1983 is dependent upon a finding that plaintiffs were entitled to minimum wage under the federal or Arizona statutes. For this reason, the court's analysis of plaintiff's § 1983 claim follows the resolution of plaintiffs' federal and state statutory claims.

work they perform for the prison industries program. The FLSA requires an "employer to pay minimum wage to an "employee" under specific circumstances. *See* 29 U.S.C. § 206(a)(1) (1982). The statute defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1982). The term "employ" is defined as including "to suffer to permit work." 29 U.S.C. § 203(g) (1982). An "employer" is one who acts "directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1982). An entitlement to minimum wage must be predicated upon the existence of an employment relationship. *See* 29 U.S.C. § 206(a)(1) (1982).

Because the above definitions are stated in only the broadest of terms, courts have adopted a case by case analysis to determine whether an individual is entitled to the minimum wage provisions of the FLSA. *See Carter v. Dutchess Community College*, 735 F.2d 8, 12 n.1 (2d Cir. 1984). This does not mean, however, that there are no governing standards to assist the reviewing court Rather, courts have adopted an "economic realities" test to determine whether an employment relationship exists for the purposes of the FLSA. The most recent formulation of this standard was set forth in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), in which the Court of Appeals stated that a court should inquire into "whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.*

Plaintiffs urge the court to apply the above "economic realities" test to the instant lawsuit and this argue that the parties must first develop a factual record before the court may consider the pending dispositive motion. It is undisputed that in FLSA cases not involving inmates, the

"economic realities" test is the appropriate standard used by courts to determine whether an employer-employee relationship exists under the statute. Defendants also acknowledge that courts have applied this same test in cases involving inmates seeking minimum wages for their labor. In fact, plaintiffs cite four cases in which the reviewing court applied the "economic realities" test to inmates' FLSA actions. *See Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984); *Alexander v. Sara, Inc.*, 559 F. Supp. 42, 44 (M.D. La. 1983), *aff'd*, 721 F.2d 149 (5th Cir. 1983); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 786-88 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 978, 92 S. Ct. 1196, 31 L. Ed. 2d 254 (1972); *Hudgins v. Hart*, 323 F. Supp. 898, 899 (E.D. La. 1971); *see also Prieur v. D.C.I. Plasma Center of Nevada*, 726 P.2d 1372, 1373 (Nev. 1986) (applying economic realities test to prisoners' FLSA claim).

In the instant matter, plaintiffs do not seek to recover minimum wages from an outside, private employer. Rather they seek to have the court declare that the State of Arizona, the Department of Corrections, ARCOR, and various state officials, are "employers" within the purview of the FLSA. In other words, plaintiffs would have the court hold that the various named defendants are *de facto* "outside" employers. Thus, the sole issue presented by defendants' motion to dismiss plaintiffs' FLSA claim is whether the state, its agencies, or officials could ever be "employers" within the meaning of the federal statute. The court holds that they cannot and therefore grants defendants' motion to dismiss plaintiffs' FLSA claim.

Case law relied upon by plaintiffs merely supports the proposition that an "economic realities" analysis is appropriate to determine whether an *outside, private* firm or corporation is an employer of the inmate. *See, e.g., Carter v. Dutchess Community College*, 735 F.2d at 12

("We hold only that an inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending upon how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent."); *Alexander v. Sara, Inc.*, 559 F. Supp. at 44 (economic realities test shows that "the inmates who participate in the plasma program do not lose their status as inmates. The inmates remain, as indeed they must, under the Direct Supervision and control of the [non-party] Louisiana Department of Corrections and not [defendant] Sara, Inc."); *Sims v. Parke Davis & Co.*, 334 F. Supp. at 787 ("plaintiffs are not in economic reality employees of defendant drug companies as that word is defined in the Act"); *Hudgins v. Hart*, 323 F. Supp. at 899 ("plaintiff was not an employee of [Hyland Laboratories] for the purposes of the Fair Labor Standards Act"); *see also Prieur v. D.C.I. Plasma Center of Nevada*, 726 P.2d at 1373 (economic reality established that inmates were not "employees" of private contractor). These cases are clearly distinguishable from the instant matter since plaintiffs do not name any private, outside entities as defendants. Instead plaintiffs seek to have the court apply the "economic realities" test to the custodial relationship between correctional institution and inmate. Both case law and logic reject this position.

In fact, the above cited cases support defendants' motion to dismiss the FLSA cause of action. In applying the "economic realities" test to inmate labor situations, the reviewing courts examined whether the outside contractors exercised typical employer prerogatives over the inmate labor pool. *See, e.g., Carter v. Dutchess Community College*, 735 F.2d at 14. If the reviewing court concluded that the private contractor did not retain the traditional employer rights, then it followed that the FLSA was not applicable because inmate labor belongs to the institution and inmate laborers do not lose their primary status as inmates simply because they work. *See Alexander v. Sara,*

Inc., 559 F. Supp. at 44; *Hudgins v. Hart*, 323 F. Supp. at 899; *Prieus v. D.C.I. Plasma Center of Nevada*, 726 P.2d at 1373; *see also McGinnis v. Stevens*, 543 F.2d 1221, 1238 (Alaska 1983) ("[a] prisoner is not an 'employee' of the state under the federal act"). Put another way, an application of the "economic realities" test in the inmate labor situation where no outside contractor is even alleged could only lead to the foregone conclusions that: (1) no outside contractor is an "employer" of the inmates; and (2) the state penal system retains complete control over the inmate laborers. Plaintiffs have cited no authority, nor can they, to complete this syllogism to read: and (3) the state penal system is therefore the "employer" of the inmates within the meaning of the FLSA.

The court's analysis is also supported by the logic of plaintiffs' own arguments. It is uncontested that under Arizona law, prisoners are under a legislative mandate to perform "hard labor"—such as outside yard and grounds work, kitchen duties, maintenance crews, and other work details. *See* A.R.S. § 31-251 (West Supp. 1987). These hard labor jobs are not performed under private sector contracts. Compensation to the inmate for this form of labor is at the discretion of the director of the Department of Corrections, but in no event may this compensation exceed fifty cents per hour. A.R.S. § 31-254.A (West Supp. 1987). The director's wage policy for these jobs is set forth in a published set of guidelines known as the Wage Incentive Pay Program ("WIPP").

After acknowledging the above statutory scheme, plaintiffs state that "[n]one of the plaintiffs in this case seeks [sic] recovery for WIPP pay; the present plaintiffs are only ARCOR personnel seeking the prescribed ARCOR wage." Plaintiffs' Amended Response to Motion to Dismiss, 16-17. Unfortunately for plaintiffs, this argument proves too much. First, to the extent plaintiffs' claim for minimum wages is based on the Arizona ARCOR statutes, then that particular claim more appro-

priately follows resolution of plaintiffs' FLSA claim. Plaintiffs' claim for minimum wages under federal statutory law must withstand an independent FLSA analysis. More important, however, is the fact that plaintiffs concede that they have no claim against the state or its agents for work performed in the prison for the institution. Just as there is no outside, private employer in the "hard labor" situation, so too in the present litigation, plaintiffs do not seek federally mandated wage levels from private contractors. And to the extent that plaintiffs have no viable claim for FLSA wages from prison officials for their "hard labor," they cannot now seek FLSA wages from these same officials for work performed in conjunction with the prison industries program. For all of the foregoing reasons, the court grants defendants' motion to dismiss plaintiffs' claim for minimum wages under the Fair Labor Standards Act.

(2) STATE LAW ANALYSIS

Plaintiffs claim that they are entitled to minimum wages, pursuant to the provisions of A.R.S. §§ 31-254 and 23-355, for the work they perform under the prison industries program. The Arizona statute provides:

> A. Each prisoner who is engaged in productive work in any state prison or institution under the jurisdiction of the department of corrections as a part of the prison industries program shall receive for his work such compensation as the director of the department of corrections shall determine. Such compensation shall be in accordance with a graduated schedule based on quality and quantity of work performed and skill required for its performance, but in no event shall such compensation exceed fifty cents per hour unless the prisoner is employed in an Arizona correctional industries program [ARCOR] pursuant to title 41, chapter 11, article 3 [A.R.S. § 41-1621 *et seq.*]. If the director enters into a con-

> tract pursuant to § 41-1624.01 with a private person, firm, corporation or association the compensation shall be as prescribed by the person, firm, corporation or association, but shall not be below minimum wage. Compensation shall not be paid to prisoners for attendance at educational training or treatment programs, but compensation may be paid for work training programs.

A.R.S. § 31-254.A (West Supp. 1987). A.R.S. § 41-1624.01 (West Supp. 1987), to which the above statute refers, provides in pertinent part:

> A The director shall compensate prisoners for their services pursuant to § 31-254.
>
> B. The director or his designee may contract with any state agency, political subdivision, or state department or any private person, firm, corporation or association to provide services or labor rendered by prisoners.

Id.

Finally, the pertinent language describing the correctional industries program is found at A.R.S. § 41-1623.D (West Supp. 1987), and states in part:

> D. The director or his designee, consistent with sound business judgment, may construct, reconstruct or lease one or more buildings or portions of buildings on the grounds of any state correctional institution or location under department control, together with the real estate needed for reasonable access to such buildings, any lease to have a term of not to exceed twenty years to a private corporation for the purpose of establishing and operating a factory for the manufacture and processing of products or any other commercial enterprise deemed by the director to provide employment opportunities for inmates in meaningful jobs for wages. Each lease negotiated and concluded pursuant to this section shall include

and shall be valid only so long as the lessee adheres to the following provisions:

1. All persons employed in the factory or other commercial enterprise operated in or on the leased property, except the lessee's supervisory employees and necessary training personnel, shall be inmates of the institution where the leased property is located who are approved for such employment by the director or his designee.

2. The factory or other commercial enterprise operated in or on the leased property shall observe at all times such practices and procedures regarding security as the lease may specify or as the director may temporarily stipulate during periods of emergency.

3. The factory or other commercial enterprise operated on the leased property shall be deemed a private enterprise and subject to all the laws and lawfully adopted rules of this state governing the operation of similar business enterprises everywhere.

Id.

. . .

Plaintiffs' Third Claim for Relief in their First Amended Complaint is based upon the above Arizona statutory scheme. Specifically, they allege that defendants refuse to pay them minimum wages pursuant to the provisions of A.R.S. § 31-254. They therefore request a judgment against all named defendants as follows:

1) In such amount as may be proved to be due plaintiff when employed within the three years prior to the filing of the original complaint herein for each hour worked pursuant to which plaintiff was not paid the minimum wage pertaining at the time;

2) For treble the wages due under A.R.S. 23-355;

3) For the additional sum of $10,000,000 as and for exemplary and punitive damages;

4) That plaintiff have reasonable attorneys' fees as incurred;

5) That plaintiff have his costs incurred herein; and

6) That plaintiff have such other and further relief as is just and proper in the premises.

Plaintiff's First Amended Complaint, 11.

Defendants offer no substantive analysis of plaintiffs' state law claims. Instead, they contend that the court lacks subject matter jurisdiction to hear this cause of action. Because the court concurs with defendants' position and holds that it lacks subject matter jurisdiction to hear this portion of plaintiffs' First Amended Complaint, it grants defendants' motion to dismiss plaintiffs' state law claims for relief.

The court begins its analysis by noting that the state of Arizona is a named defendant in this action. However, absent the state's consent to suit,[2] or express congressional abrogation of the state's sovereign immunity,[3] the eleventh amendment bars the court from granting plaintiffs any relief against the state defendant. *See Ala-*

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[2] *See generally* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1523 (1987) ("the eleventh amendment counsels hesitation. When the state has created a right running against itself, but has failed to take the additional step of consenting to suit in federal court, the federal court should find that jurisdiction properly belongs to the state courts").

[3] This holding also bars plaintiffs' § 1983 claim against the state of Arizona. The court did not consider this matter in the preceding discussion of plaintiffs' FLSA claim because Congress expressly abrogated state sovereign immunity when it amended the FLSA to allow suit in state or federal court. *See Bonnette v. California Health & Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976).

bama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam). Furthermore, plaintiffs' state law claim seeks retroactive relief in the form of back-pay allegedly owed plaintiffs. To the extent plaintiffs seek an award from the court for these wages from state agencies and officials, then the eleventh amendment again deprives the court of subject matter jurisdiction. *See Edelman v. Jordan*, 415 U.S. 651, 666-67, 94 S. Ct. 1347, 1357-58, 39 L. Ed. 2d 662 (1974).

Finally, even if they sought only prospective relief, it is clear that plaintiffs would have the court enforce *state* law against state agencies and officials. As such, the court is without subject matter jurisdiction to entertain, let alone award relief for, any portion of plaintiffs' state law claim. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 107, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). The Supreme Court in *Pennhurst* held that federal courts lack subject matter jurisdiction to order state agencies or officials to conform their conduct in compliance with state law because

> [a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

465 U.S. at 106, 104 S. Ct. at 911.

Plaintiffs attempt to avoid the clear holding of *Pennhurst* by arguing that the state agencies and officials who have thus far denied plaintiffs minimum wages acted *ultra vires*, and therefore were outside the scope of the eleventh amendment. Just as the majority in *Pennhurst*

rejected this argument, so too does the court in the present matter. The Court in *Pennhurst* concluded that the *ultra vires* doctrine can operate to avoid the *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 2d 714 (1908), doctrine and the eleventh amendment's bar only when (1) it is necessary to vindicate federal rights, and (2) it is clear that an official acts "without any authority whatever." *Pennhurst*, 465 U.S. at 101 n.11, 114 n.25, 117, 104 S. Ct. at 908 n.11, 915 n.25, 917. Plaintiffs' allegations in their complaint meet neither of these requirements, and thus plaintiffs' state law claims against defendants fall within the scope of *Ex Parte Young*.

The *Pennhurst* holding clearly removes the court's ability to exercise pendent jurisdiction to entertain plaintiffs' state law claims, since this "judge-made doctrine" cannot displace "the explicit limitation on federal jurisdiction contained in nthe Eleventh Amendment." *Pennhurst*, 465 U.S. at 117-18, 104 S. Ct. at 917. Because the *Pennhurst* holding prohibits the court from deciding plaintiffs' pendent state law claims, the court grants defendants' motion to dismiss plaintiffs' claim for minimum wages under the applicable Arizona statutes.

(3) SECTION 1983 ANALYSIS

Plaintiffs' First Claim for Relief in their First Amended Complaint is based on 42 U.S.C. § 1983, and the decision in *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc). The *Piatt* court held that if a prisoner meets the requirements of an Arizona statute mandating wages for prisoners who perform work for private parties under contract with the Department of Corrections, then the state cannot deprive the inmate of this "liberty" interest without due process of law. *Id.* Thus, the *Piatt* holding implicitly requires that a federal court determine the validity of the underlying state law claim in the § 1983 action. The holding would also seem to allow such an action to be heard by a court under federal question sub-

ject matter jurisdiction, even though such a claim revolves solely around state law claims directed against state officials.

Plaintiffs' § 1983 claim seeks the following relief from the court:

> 1) That defendants . . . be enjoined from not paying past due and future minimum wages and compensation under the Act and state law; that a monetary judgment be ordered against defendants in the amount of the past wages and liquidated damages due, which, when paid will be deemed in expungement of any such injunction for past wages due under the Act;
>
> 2) For the additional sum of $10,000,000 as and for exemplary and punitive damages;
>
> 3) That plaintiff have reasonable attorneys' fees as incurred;
>
> 4) That palintiff have his costs incurred herein; and
>
> 5) That plaintiff have such other and further relief as is just and proper in the premises.

Plaintiffs' First Amended Complaint, 8.

As the court noted earlier, this § 1983 claim is dependent upon a finding that plaintiffs were entitled to minimum wage under the federal or Arizona statutes. Because the court grants defendants' motion to dismiss (1) the federal claim for failure to state a claim upon which relief can be granted, and (2) the state claim for lack of subject matter jurisdiction, it thus seems that plaintiffs no longer retain a colorable claim under this civil rights statute. However, it is logically possible that although the court lacks subject matter jurisdiction to hear the underlying state law claims, under the Court of Appeals' holding in *Piatt*, the court may still retain federal question subject matter jurisdiction to hear plaintiffs' § 1983 suit.

Of course, the practical result of this would be to allow the court to consider the substance of the state claims against the state officials. Before the court may analyze the merits of plaintiffs' § 1983 claim, based on a deprivation of their alleged state statutory rights, the court must first decide if it has subject matter jurisdiction to entertain plaintiffs' remaining cause of action. Indeed, defendants' sole argument in support of their motion to dismiss this claim appears to be that the court lacks subject matter jurisdiction as to this § 1983 cause of action.[4] Even were this issue not raised by defendants, however, the court would be compelled to resolve any doubts as to its jurisdiction to hear the claim.

Essentially, the court must decide whether retaining subject matter jurisdiction over this remaining claim is consistent with the decisions of the Supreme Court in *Alabama v. Pugh*, *Edelman*, and *Pennhurst*, and the Ninth Circuit's subsequent holding in *Piatt*.

First, plaintiffs' claim against the State of Arizona as a named defendant remains barred by the eleventh amendment since Congress has not abrogated a state's sovereign immunity from suit under § 1983. *See Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam). Additionally, plaintiffs' § 1983 claim seeks retroactive relief in the form of back-pay allegedly owed plaintiffs. To the extent plaintiffs seek an award from the court for these wages from state agencies and officials, then the eleventh amendment again deprives the court of subject matter jurisdiction. Under the Court's holding in

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[4] Although filed before the court granted leave to plaintiffs to file their First Amended Complaint, and thus explicitly plead a § 1983 claim, defendants argued that any cause of action based on the holding in *Piatt* would still lack subject matter jurisdiction in federal court since "the court in *Piatt* failed to consider the application of the Eleventh Amendment as it pertains to this claim." Defendants' Reply, 2.

Edelman, in an action under § 1983, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." 415 U.S. at 666-67, 94 S. Ct. at 1362. This eleventh amendment bar against retroactive reilef remains in effect even though plaintiffs' claim arises under the federal Constitution. *See Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

This distinction between prospective and retroactive relief is not the controlling factor in deciding whether the eleventh amendment, under the Court's holding in *Pennhurst*, bars this court from enforcing compliance with *state* law. *See Pennhurst*, 465 U.S. at 106, 104 S. Ct. at 911, *see also* Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1480 n.224 ("*Pennhurst's* analysis invites us to reorient the Eleventh Amendment's axis from the prospective-retrospective line of *Edelman* to the state law-federal law distinction involved in both *Pennhurst* and *Chisholm*"). In fact, the *Pennhurst* court identified at least three intrusive aspects in the lower court's order: (1) bringing a sovereign state into federal court without its consent; (2) imposing a substantial and ongoing financial burden on the state; and (3) ordering state officials to conform their conduct to state law, relief which does not vindicate federal law. *Pennhurst*, 465 U.S. at 99-100, 104, 105, 104 S. Ct. at 907, 910, 911. Hence, all that remains for the court to decide is whether it has subject matter jurisdiction to award prospective, injunctive relief [5] to plaintiffs under their § 1983 cause of action. Simply stated, the issue is whether the *Piatt* decision is consistent with the holding in *Pennhurst*.

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[5] The court assumes for the purposes of the pending motion that plaintiffs' prayer to enjoin defendants from "not paying" minimum wage pursuant to Arizona statutes may be construed as a request for prospective-injunctive or declaratory relief.

Although defendants suggest that the question of subject matter jurisdiction was never raised before the Court of Appeals in *Piatt*, the court notes that this case was decided approximately one year after the Supreme Court's decision in *Pennhurst*. However, as previously discussed by the court, the *Edelman* doctrine denying a court in a § 1983 claim subject matter jurisdiction to grant retroactive relief wuold have limited the remedies available to the trial court on remand in the *Piatt* case.

Furthermore, the court concludes that even if the eleventh amendment bad had been raised in *Piatt*, the Court of Appeals' ruling would not have been affected by *Pennhurst*. The *Pennhurst* majority attempted to balance two conflicting doctrines: (1) a federal court's pendent jurisdiction over state law claims; and (2) the eleventh amendment's prohibition against states being sued in federal court. As pointed out earlier, the majority in *Pennhurst* concluded that the common law principle of pendent jurisdiction could not override an explicit constitutional provision to the contrary. Because plaintiffs' remaining § 1983 claim is before the court under federal question subject matter jurisdiction, this grant of jurisdiction distinguishes the present case and *Piatt*, from the facts in *Pennhurst*.

Additionally, assuming plaintiffs were to prevail on the merits of their remaining § 1983 claim concerning denial of their alleged state statutory rights, an award from this court of prospective-injunctive or declaratory relief would be consistent with *Pennhurst* since the relief granted: (1) would not place a financial burden on the state pursuant to the doctrine of *Ex Parte Young* and the Court's holding in *Edelman*; and (2) would vindicate federal rights in that plaintiffs seek, pursuant to the holding in *Piatt*, due process of law for their alleged "liberty interest" in minimum wages as mandated by Arizona statute. Although it appears to the court that plaintiffs have in essence "bootstrapped" § 1983 subject matter jurisdiction

on to their state law claims, the court cannot conclude that this is inconsistent with the Court of Appeals' holding in *Piatt* and the Supreme Court's holding in *Pennhurst*.[6]

The court therefore concludes that it has subject matter jurisdiction to hear plaintiffs' § 1983 claim based on an alleged deprivation of minimum wages due under the Arizona statutory scheme only in the limited sense that if plaintiffs succeed on this claim the court may grant prospective-injunctive or declaratory relief. Because defendants' motion to dismiss does not address the substance of plaintiffs' underlying state law claims, the court denies defendants' motion to dismiss this remaining claim. The court therefore grants in part and denies in part defendants' motion to dismiss plaintiffs' First Claim for Relief based on 42 U.S.C. § 1983.

IT IS ORDERED consolidating the present action encompassing 271 plaintiffs with 45 additional actions currently pending before this court involving the same questions of law and fact, the same named defendants, and represented by the same counsel.

IT IS FURTHER ORDERED that this consolidation order and the following orders of the court shall apply to all 316 cases now consolidated into the present action regardless of whether defendants in these individual actions received service of process or whether, pursuant to the court's previous orders, service of process was stayed pending resolution of defendants' dispositive motion.

IT IS FURTHER ORDERED that a supplement form of order specifically listing the name and caption of all

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[6] Indeed, at least one plaintiffs' lawyer/commentator in the wake of *Pennhurst* posited this precise method, among others, as a model for remaining in federal court. *See* English, *The* Pennhurst II *Decision and its Implications for Foster Care Litigation*, 18 Clearinghouse Review 33, 36-37 (1984) (counseling a plaintiff suing state officials on state law grounds to argue that relevant state law creates a "property" interest, the deprivation of which creates a federal claim).

cases now consolidated into the present action will follow the filing of the present memorandum and order.

IT IS FURTHER ORDERED vacating the court's previous orders staying service of process upon defendants in the consolidated, but unserved, cases.

IT IS FURTHER ORDERED that counsel for defendants shall inform the court within twenty (20) days from the filing of this order whether he is authorized to accept service for all defendants in this now consolidated matter.

IT IS FURTHER ORDERED that if counsel for defendants does not so inform the court, the office of the U.S. Marshal is directed to serve all defendants in this consolidated action.

IT IS FURTHER ORDERED granting in part and denying in part, consistent with the preceding memorandum of the court, defendants' motion to dismiss plaintiffs' First Claim for Relief, based on 42 U.S.C. § 1983, contained in plaintiffs' First Amended Complaint.

IT IS FURTHER ORDERED granting defendants' motion to dismiss plaintiffs' Second Claim for Relief, based on the 29 U.S.C. § 201 *et seq.*, contained in plaintiffs' First Amended Complaint.

IT IS FURTHER ORDERED granting defendants' motion to dismiss plaintiff's Third Claim for Relief, based on A.R.S. §§ 31-254 and 23-355, contained in plaintiffs' First Amended Complaint.

DATED this 3rd day of August, 1988.

/s/ Robert C. Broomfield
ROBERT C. BROOMFIELD
United States District Court

Copies to counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 85-1205 PHX WPC (MM)
FELTON HALE; and RICHARD S. BERRY,
Plaintiffs,

vs.

STATE OF ARIZONA; ARCOR ENTERPRISES, a division of the State of Arizona DEPARTMENT OF CORRECTIONS, a division of the State of Arizona; JAMES RICKETTS; THOMAS LESCAULT; SAMUEL LEWIS; TONY WEST; DAVID TIERNEY; EARL COBB; THOMAS DONNELLY; HENRY EVANS; MARCUS ENGLEMAN; and RAY SHAFFER,
Defendants.

MEMORANDUM AND ORDER

[Filed Dec. 8, 1988]

Plaintiffs Berry and Hale move for a rehearing on the Defendants Motion to Dismiss, or alternatively, for a new trial, following this Court's order of August 31, 1988 which dismissed the action pursuant to Local Rule 11(h) (now 11(1)). On September 29, 1988, this Court vacated that order. The Court now rules on the Plaintiffs' Motion for Summary Judgment, the Defendants' Cross-Motion for Summary Judgment, the Plaintiffs' Motion to Strike the Cross-Motion for Summary Judgment and the Defendants' Motion to Dismiss (which will be treated as a Motion for Summary Judgment and considered in conjunction with the previously filed Cross-Motion for Summary Judgment).

I. FACTUAL BACKGROUND

Plaintiffs[1] Richard S. Berry and Felton Hale filed a complaint against the Defendants alleging violations of the Fair Labor Standards Act ("FLSA"), the Civil Rights Act (Title 42 U.S.C. § 1983) and Arizona State Law (A.R.S. §§ 31-254 and 23-355). The Plaintiffs argued that the State of Arizona, the Department of Corrections ("DOC"), ARCOR (now Arizona Correctional Industries or "ACI") and the individual Defendants violated the above-listed statutes by failing to pay them the prevailing minimum wage for work performed in a buckle-making shop, physically located within the prison complex.

Plaintiff Berry was an inmate in the custody of the Arizona DOC between September, 1984 and May, 1985. (P's Facts ¶ 1).[2] Berry was working in a buckle-making business run by inmates as part of the inmate-operated business enterprise program ("I.O.B.E."). (P's Facts ¶ 2). Berry seeks minimum wages from the State Defendants claiming they were responsible for the IOBE's and had control over these businesses. The Defendants claim, however, that they maintained only that control which was necessary for the security of the prison facility. The Plaintiffs argue that the Defendants controlled all of the hiring, firing and day-to-day working conditions and restrictions of the businesses. In addition, the Plaintiffs claim that the Defendants were responsible for the

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[1] Several hundred people filed requests to be included as Plaintiffs in this case. The Magistrate ruled that the requests had been solicited and were, therefore, ineffective. Thereafter, many others filed requests for joinder or requests to be included as plaintiffs. A motion for class certification was denied, however, the Court has treated these additional people as Plaintiffs in this case and all have been represented in this matter by the same attorney who represents Plaintiffs Berry and Hale.

[2] Notes entitled "P's Facts at ¶ xxx" refer to Plaintiffs Statement of Facts in Support of Motion for Summary Judgment, filed February 25, 1988.

setting and payment of wages, and were, in essence, their employers and liable for the payment of minimum wages. The actual inmates who operated the businesses were not named in this lawsuit.

II. THE INMATE-OPERATED BUSINESS PROGRAM

The IOBE's began as a result of legislation which allowed the Defendant ARCOR Enterprises to establish a program for the inmate population.

> The industries or enterprises shall be conducted for the employment of prisoners in the manufacture, or production of such articles, or products as may be needed for the construction, operation, maintenance or use of any office, department, institution or agency supported in whole or in part by a state or its political subdivisions or for sale to the public.

A.R.S. § 41-1622 (1985).

This legislation was designed to enable the prison population to gain business experience and other skills that would better prepare them for their return to the community. In addition, it enabled the prisoners to profit from their operations by selling the goods they manufactured. This money was to be used to make restitution where required, or to provide the inmates with a "nest egg".

III. MINIMUM WAGES UNDER A.R.S. § 31-254

The Plaintiffs claim that the provisions of Arizona Revised Statutes, sections 23-355 and 31-254, require that they be paid the minimum wage for all work performed at the buckle shop.

Arizona Revised Statute, section 31-254 authorizes the payment of wages to prison-inmates "engaged in productive work in any state prison or institution . . . as part of the prison industries program." The statute spe-

cifies that wages paid when an inmate is engaged in employment pursuant to the provisions of A.R.S. § 41-1624.01, shall be "prescribed by the private person, firm, corporation or association but shall not be below the minimum wage." A.R.S. § 31-254(A). This section only authorizes the payment of minimum wages when these have been prescribed by the individual IOBE owner. Further, it requires that the individual IOBE owner remain liable for these wages—not the named Defendants.

The statute under which the Plaintiffs claim entitlement to minimum wages is clearly not intended to provide the redress they request.

> J. Nothing in this section is intended to restore, in whole or in part, the civil rights of any prisoner. *No prisoner compensated under this section shall be considered as an employee or to be employed by the state or the department of corrections.*
>
> * * * *

A.R.S. § 31-254 (J) (Supp. 1987) (emphasis supplied).

The Plaintiffs claim that the control exercised by the named Defendants was of such a nature that they should be deemed jointly liable for the wages due under § 31-254. The Court does not agree with this argument and specifically rejects the "joint employer" theory. The Court also rejects the Plaintiffs' argument that the recent Ninth Circuit opinion, *Baker v. McNeil Island Correctional Center*, 859 F.2d 124 (9th Cir. 1988), requires that an employment relationship exist. In *Baker*, Title VII specifically addressed the prison/inmate relationship as one covered by its provisions. No such coverage is provided under Arizona or Federal law for the circumstances at bar.

Arizona Revised Statute § 41-1622 *et seq.*, provides the Defendants with the authority to "promulgate rules and regulations for the administration and management of personnel policies for prisoner workers, including wages,

working hours and conditions of employment." ARCOR used that authority to set up the IOBE's and the policies and practices under which these businesses would operate.

The Plaintiffs must recognize, in addition, the numerous provisions within the forms used by the prison officials which specify that the businesses operated by the individual inmates are not connected with the prison system in any manner. *See* the Description of Legal Authority (attached as Exhibit A to Plaintiffs Motions for Summary Judgment), at §§ 1(E); II(A)(1)(2a); III(A)(5)(c), (d); III(B)(I)(b); III(B)(II)(a)(2); III(C)(1); IV (A), and (B)(1), (2), (4). *See also,* "Resident-Operated Business Enterprises" (attached as the first Exhibit B to Plaintiffs Motions for Summary Judgment), at page 1, ¶ 1; page 2, ¶¶ 5, 6, 7; page 3, ¶ 8; page 7, ¶ 9; page 8, ¶ 13, 14; page 9, ¶ 20; page 10, ¶ 23, 24, 26; and page 11 ¶ 28, 29, 30. All of these citations clarify that the IOBE's are separate entities and entirely distinct from the prison system.

The control maintained by the Defendants was that necessary for the security of the correctional institution. As a means of maintaining this security, the prison officials must review the names and records of the inmates who seek to operate a business, as well as the records of those who intend to work for that business. The prison officials must also adopt security measures to oversee the exchange of money and goods. The goal of enacting A.R.S. § 41-1622 *et seq.*, was not to develop a new free enterprise system with all of its attendant freedoms, but to provide the inmates of the State's prisons with the opportunity to perform jobs which will develop business and related skills. No one can seriously argue that the Arizona Legislators contemplated a free-market society within the prison walls by operation of this program. Clearly, the need for supervision and the maintenance of security was not set aside by this statute.

There is nothing within the statute which requires that the Defendants remain ultimately liable for all of the

obligations incurred by the prison inmates who start a business. This would be an absurd requirement and could result in State liability for any number and type of obligation incurred by the prisoners. Further, to require the Defendants to pay the minimum wage to all prisoners who work in any IOBE would certainly circumvent the provisions of A.R.S. § 31-254, which authorizes the prison director to pay prisoners at a capped rate of $.50 per hour.

The provisions of the Arizona statute were clearly enacted to provide the prison system and other state-supported agencies with the option to have their supplies manufactured by prison inmates for purposes of economy and to provide the inmates with work opportunities. The goal was not to embark upon a multifaceted manufacturing enterprise whereby each prison inmate who qualified could choose the products he wished to make and the prison would be held ultimately responsible for all of the contracts and obligations into which the inmate entered.

In addition, it is arguable that the products manufactured by the buckle shop even fall within the provisions of this statute. Products to be produced under the statute "shall be devoted, first, to fulfilling the requirements of the offices, departments, institutions and agencies of the state which are supported in whole or in part by the state, and, secondly, to providing the political subdivisions of the state and the public with such articles and products." A.R.S. § 41-1629 (Supp. 1987). The products manufactured by the IOBE in which Plaintiff Berry was employed, were belt buckles. The products anticipated by the legislature in enacting the laws which authorized the IOBE program certainly did not include belt buckles, but rather, products that were needed first, by the prison institution or its subdivisions. After those needs were met, the inmates were then authorized to supply political subdivisions of the state and the public

with their wares. Neither the buckle-making business owner nor the Plaintiffs can seriously argue that the buckles made were first offered to the agencies and offices supported by the state to fulfill their requirements and only after, offered to the public.

The Plaintiffs rely on the Ninth Circuit case of *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985) for their arguments that they are entitled to minimum wages from the Defendants for all of the time they worked in IOBE businesses. While *Piatt* holds that one Arizona statute does require the payment of minimum wages if "his work was done as part of a contract with a private entity" (*Id.* at 1036), that court did not determine whether, in fact, Mr. Piatt was entitled to this money. The case was remanded for further proceedings to determine if that plaintiffs' work qualified under the Arizona statute. Further, the *Piatt* court held that prison officials could not deny those wages, if a right to them existed, without due process. Due process in the prison context at least for the *Piatt* court, required only an opportunity for Mr. Piatt to be heard at the time when the wages were due and unpaid. The *Piatt* court did not determine that the plaintiff's allegations of entitlement were true. Specifically, the *Piatt* court did not address whether the contract entered into between the private organization and the state prison fell within the mandates of the minimum wage law.

In this action, there is no evidence supporting a claim that the prison's authorization of the buckle shop constituted a contract as defined by the Arizona statute. Further, the statute clearly anticipates that the private entity retain responsibility for the payment of wages—not the State-run prison system.

IV. ELEVENTH AMENDMENT IMMUNITY

The Supreme Court case of *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978), bars the Plaintiffs complaint against the State, alleging state law violations.

The State has not consented to suit in the Federal court. Further, this Court may not issue the order that the Plaintiffs request.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911 (1984).

The Plaintiffs argue that the State has consented to suit in Federal Court because it chose to enter into a program which allowed prison inmates to produce and ship goods in interstate commerce. However, in order for the State to either consent to suit or waive its sovereign immunity, this intent must be unequivocally expressed either by the State or by Congress. *Pennhurst*, 465 U.S. at 100, 104 S.Ct. at 908.

Plaintiffs counsel cites *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978) for their argument that the Eleventh Amendment does not bar the plaintiffs claims. The *Finney* case allowed the award of attorneys fees, but did not address the issue of whether the 11th amendment bars the rest of the claims.

The Plaintiffs also argue that the Civil Rights Act created a waiver to sovereign immunity. This argument was rejected in *Edelman v. Jordan*, 415 U.S. 651, 676-677, 94 S.Ct. 1347, 1362 (1974). The *Edelman* court held that this Court's power in a § 1983 action is limited to prospective injunctive relief and cannot include an award of money which would require payment out of the State's funds. *Edelman*, 415 U.S. at 677, 94 S.Ct. at

1362. The *Finney* case further clarifies the Edelman language and indicates that a waiver or consent to jurisdiction must be:

> sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislations [or] we undermine the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to 'place new or even enormous fiscal burdens on the States'.

Hutto v. Finney, 437 U.S. at 706, 98 S.Ct. at 2581 (J. Powell, concurring in part, dissenting in part), *quoting*, *Employees v. Missouri Public Health & Welfare Dept*, 411 U.S. 279, 284, 93 S.Ct. 1614, 1618 (1973).

This Court disagrees with the Plaintiffs arguments that the case of *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), permits the adjudication of their claims. The *Garcia* court determined that a transit system, operated by the State of Texas, was not exempt from the mandates of the FLSA. That court held that the minimum wage requirements, as applied to this transit-authority, did not destroy state sovereignty or violate any constitutional provision. The same is not true of this case. Plaintiffs counsel argues that the payment of minimum wages by the state "is hardly a matter that will vitally affect Arizona's sovereignty". *See* Plaintiffs Response to Motion to Dismiss/ Reply to Supplemental Response-Response to Defendants Cross-Motion for Summary Judgment at page 12. Quite a difference exists between a transit operation that is overseen by a State agency and the entire Arizona Prison system. The payment of minimum wages would require more than the State dipping into some fund. According to Plaintiffs arguments, the State is ultimately responsible for this wage. Based on this premise, the State would remain liable for the minimum wage even if the IOBE made little or no money. This argument is untenable

and such a requirement would necessarily involve the State obtaining funds from its treasury. Such an action will, despite Plaintiffs arguments to the contrary, vitally affect Arizona's sovereignty.

V. RECOVERY UNDER TITLE 29 U.S.C. § 201 *et seq.*

Title 29, United States Code section 206, requires payment of minimum wages by any employer who is "employed in an enterprise engaged in commerce or in the production of goods for commerce . . ." 29 U.S.C.A. § 206 (1978). None of the parties readily dispute that the prison inmates produced goods that could be shipped through interstate comerce and therefore were "goods for commerce". However, the parties hotly contest whether the Defendants were "employers" for purposes of this statute. An "employer" is one who acts "directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C.A. § 203(d) (1982). The Defendants in this action did not act directly or indirectly in their interest as an employer in establishing the IOBE's or by allowing the Plaintiffs to work in a buckle-making enterprise. Further, the provisions of A.R.S. § 31-254 specifically rejects the theory that the prison officials or the system are employers under the IOBE program.

The Plaintiffs argue that a time-worn "economic realities" test should be used to determine whether the prison officials in this action constitute employers for purposes of the FLSA. The economic realities test is, however, not appropriate in the context of this case. Such a test is used when an outside, private firm or corporation is an employer of the inmate, and could appropriately be used to determine if the buckle-making shop itself was an employer. *See, Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2nd Cir. 1984) ("an inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending upon how many typical

employer prerogatives are exercised over the inmate by the outside employer, and to what extent.") The Plaintiffs do not name the buckle-making enterprise as a defendant in this action, and the Court cannot apply the "economic realities" test to the correctional instittuion or the other State Defendants. Further, the specific requisites of the test cannot be met. In order to meet these requisites, the Plaintiffs must prove that the Defendants: "(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). The Plaintiffs have failed to prove these requisites and the test will not be applied to these Defendants.

VI. RECOVERY UNDER THE CIVIL RIGHTS ACT

Plaintiffs claim that the Defendants' failure to pay minimum wages violated their equal rights under the § 1983 of the Civil Rights Act. Because this Court determines that no right to minimum wage payments exist under either state or federal law, the Plaintiffs claims cannot be supported.

This Court recognizes that Judge Broomfield's recent opinion, in cases somewhat similar to that at bar, undertakes to create a forum for the plaintiffs claims of § 1983 violations. However, in both the opinions filed by Judge Broomfield, the particular circumstances in each are different than those faced in the matter of Messrs. Hale and Berry. Hale and Berry were employed by inmate-operated businesses located within the prison complex. The case of *Young v. Cutter Biological*, CIV 86-1318 PHX, RCB, involved the employment of prison inmates at a Plasma Center. The *Fuller v. State of Arizona*, CIV 86-2034 PHX RCB case, does not specify the particular circumstances, except to state that the inmates were work-

ing in jobs provided by the prison industries program. Without further information on the *Young* circumstances, this Court cannot hold that Judge Broomfield's order, which denied the Defendants Motion to Dismiss on the claimed violations of § 1983, is appropriate to the situation faced by the Plaintiffs in this action. This Court therefore grants the Defendants Motion for Summary Judgment on the Plaintiffs claimed violations of § 1983.

Consistent with the foregoing memoranda,

IT IS ORDERED:

1. The Plaintiffs Motion to Strike the Cross-Motion for Summary Judgment is denied.

2. The Plaintiffs Motions for Summary Judgment are denied.

3. The Defendants Cross-Motion for Summary Judgment and Motion to Dismiss (treated as a Motion for Summary Judgment) are granted.

4. There being no just cause for delay, the Clerk shall enter judgment accordingly.

DATED this 8th day of December, 1988

/s/ William P. Copple
WILLIAM P. COPPLE
United States District Judge

APPENDIX E

[Apr. 16, 1985]

This is in response to your letter of February 17, 1984, on behalf of and his firm,
You ask that we review a determination made by the that an employment relationship under the Fair Labor Standards Act (FLSA) existed between and prison inmates of the Correctional Center

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour for all hours worked and overtime pay of not less than one and one-half times their regular rates of pay for all hours worked over 40 in the workweek.

The Wage and Hour Division conducted an investigation of in to determine its compliance with FLSA. had entered into an agreement with the Department of Prisons to use prison inmates at the Correctional Center for the purpose of manufacturing brooms and related items for sale to commercial customers. The investigative findings disclosed noncompliance with the minimum wage, overtime pay, and recordkeeping requirements of FLSA. As a result of this investigation. agreed to comply in the future with the Act's requirement and to pay $91,730.68 in back wages to individuals employed by his firm at the correctional facility.

The FLSA applies to employees individually engaged in interstate commerce or in the production of goods for interstate commerce and to all employees of certain enterprises. However, in order for the Act to apply to a person engaged in work subject to its provisions, an employment relationship between an employer and employee must exist. Section 3(d) of the Act defines "employer"

as "any person acting directly in the interest of an employer in relation to an employee . . ." while an "employee" is referred to in section 3(e)(1) as "any individual employee by an employer." The term "employ" is defined in FLSA section 3(g) as "to suffer or permit to work."

In *Rutherford Food Corp.* v. *McComb* (331 U.S. 722) and *United States* v. *Silk* (331 U.S. 704), the Supreme Court said that the determination of an employment relationship is not based on "isolated factors" or any single characteristic. Instead, the determination depends "upon the circumstances of the whole activity" including the underlying "economic reality."

In *Carter* v. *Dutchess Community College* (735 F.2d 8 quoting *Bonnette* v. *California Health and Welfare Agency*, 704 F.2d 1465), the court acknowledged four criteria of an "economic reality test" to determine whether or not an employment relationship exists. Under this test, the existence of such a relationship depends upon " 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.' " These criteria, as they apply to the subject of your inquiry, are discussed below.

1. *Power to hire and fire.*

   Under the terms of the contract between and the Department of Prisons, eight to ten inmates were initially provided by the correctional facility to work on the project. Additional inmate workers were subsequently provided by the prison in response to requests by the contractor. Although had no opportunity to selectively "hire" workers, the firm could "fire" inmates by removing them from the project when their work was unacceptable.

2. *Supervision and control of employees.*

technicians supervised the inmates' performance to ensure that the products not quality and control standards established by the contractor. was also responsible for any modification of the facility that was necessary in order to comply with health and safety codes.

3. *Determination of rates of pay.*

established the initial rates of pay for inmates involved in the project, and the firm also retained the right to determine further adjustments to the inmates' wages on the basis or skill level. These pay rates were reviewed by correctional officials who were responsible for distributing the wages to inmates.

4. *Maintenance of employment records.*

maintained employment records for the inmate workers involved in the project at the correctional facility. The contractor also provided a copy of its monthly payroll information to the prison authorities.

As long as inmates remain within a State's custody, the prison authorities are responsible for these individuals during their incarceration. In carrying out this responsibility, correctional officials may exercise control over inmates involved in work activities for an outside employer. However, the exercise of such control by the prison does not affect the employment relationship between a private contractor and prison inmates who are "suffered" or "permitted" by the contractor to perform work for which they must be paid in compliance with FLSA. Otherwise, the legislative intent of the Act would be frustrated while allowing certain firms to benefit from an unfair economic or competitive advantage over other employers.

It is our opinion that an employment relationship existed between and the inmates who performed work for

the firm pursuant to its contract with the De-partment of Prisons. Our review of this investigation indicates that it was properly conducted and that the findings represent a correct application of the law.

We trust that the above is responsive to your concerns in this matter. Please let us know if we may be of any further assistance.

Sincerely,

Herbert J. Cohen
Deputy Administrator

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

[Jan. 21, 1993]

This is in response to your letter to Secretary of Labor Lynn Martin concerning the application of the Fair Labor Standards Act (FLSA) to inmates of penal institutions.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

It is the position of the Department that a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the FLSA. Therefore, such workers are not covered by the FLSA and would not have to be paid in accordance with its monetary provisions.

A different situation exists where inmates are contracted out by an institution to a private company or individual. In such instances an employee-employer relationship is created between the private company or individual and the prisoners. This is true regardless of whether the work is performed within the confines of the institution or elsewhere. When such a relationship comes into existence and the other requirements for coverage

are met, the inmate employees are entitled to the benefits of the FLSA.

If you have additional questions concerning the application of the FLSA to prisoners, we suggest that you contact the nearest Wage and Hour District Office.
We trust that the above information is responsive to your inquiry.

Sincerely,

/s Daniel F. Sweeney
DANIEL F. SWEENEY
Deputy Assistant Administrator

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 86-2034-PHX-RCB (MS)

JOHN LEROY FULLER, *et al.*,
Plaintiff,

v.

STATE OF ARIZONA, *et al.*,
Defendant(s).

SUPPLEMENTAL ORDER

[Filed Dec. 1, 1988]

Pursuant to the terms of the Memorandum and Order, filed August 4, 1988, and the Minute Order Entry of October 6, 1988, the following listed cases are those cases which have been consolidated into the present action or shall be consolidated into the present action. The Court notes that on August 8, 1988, Thomas Prose, attorney for defendants, filed a Response to Court Order and Notice of Acceptance of Service in which he advises this Court that he will accept service of summons and complaint for all defendants in the above-captioned matter. Accordingly, the Clerk of the Court is directed to prepare service of process with a copy of the complaint and this Order to be served at Government expense on Thomas Prose on behalf of defendants by the United States Marshal or his authorized representative for each of the cases listed below and designated with an asterisk between the Magistrate designation and the parties' names.

Counsel for the parties are directed to notify this Court in writing within 10 (ten) days of receipt of this Order if there is any discrepancy regarding the cases subject to consolidation or which ought to be consolidated with the present case. Additionally, that portion of the Order filed August 4, 1988, which states that "the present action encompass[ed] 271 plaintiffs with 45 additional actions currently pending . . .," shall be vacated.

1)	CIV 86-2035 PHX RCB (MS)	*Brinkman v. Arizona*	12/11/86
2)	CIV 86-2036 PHX RCB (MS)	*Helenick v. Arizona*	12/11/86
3)	CIV 86-2050 PHX RCB (MS)	*Yancey v. Arizona*	12/15/86
4)	CIV 86-2051 PHX RCB (MS)	*Fink v. Arizona*	12/15/86
5)	CIV 86-2075 PHX RCB (MS)	*Bilke v. Arizona*	12/17/86
6)	CIV 86-2076 PHX RCB (MS)	*Kaldenberg v. Arizona*	12/17/86
7)	CIV 86-2077 PHX RCB (MS)	*Hankins v. Arizona*	12/17/86
8)	CIV 86-2088 PHX RCB (MS)	*Vietoris v. Arizona*	12/18/86
9)	CIV 86-2113 PHX RCB (MS)	*Ybarra v. Arizona*	12/23/86
10)	CIV 86-2116 PHX RCB (MS)	*Williker v. Arizona*	12/23/86
11)	CIV 86-2116 PHX RCB (MS)	*Bloom v. Arizona*	12/23/86
12)	CIV 86-2123 PHX RCB (MS)	*Gutierrez v. Arizona*	12/23/86
13)	CIV 86-2124 PHX RCB (MS)	*Garza v. Arizona*	12/23/86
14)	CIV 86-2134 PHX RCB (MS)	*Navarre v. Arizona*	12/30/86
15)	CIV 86-2148 PHX RCB (MS)	*Lucas v. Arizona*	12/30/86
16)	CIV 86-2150 PHX RCB (MS)	*Thomas v. Arizona*	12/30/86
17)	CIV 86-2158 PHX RCB (MS)	*Eddy v. Arizona*	12/31/86
18)	CIV 86-2161 PHX RCB (MS)	*Ellis v. Airzona*	12/31/86
19)	CIV 87-33 PHX RCB (MS)	*Pilon v. Arizona*	1/12/87
20)	CIV 87-34 PHX RCB (MS)	*Frederick v. Arizona*	1/12/87
21)	CIV 87-35 PHX RCB (MS)	*Pebbles v. Arizona*	1/12/87
22)	CIV 87-36 PHX RCB (MS)	*Blackledge v. Arizona*	1/12/87
23)	CIV 87-37 PHX RCB (MS)	*Bogenschutz v. Arizona*	1/12/87
24)	CIV 87-38 PHX RCB (MS)	*Lamson v. Arizona*	1/12/87
25)	CIV 87-39 PHX RCB (MS)	*Farris v. Arizona*	1/12/87
26)	CIV 87-40 PHX RCB (MS)	*Redner v. Arizona*	1/12/87
27)	CIV 87-58 PHX RCB (MS)	*McKenzie v. Arizona*	1/13/87
28)	CIV 87-59 PHX RCB (MS)	*Morin v. Arizona*	1/13/87
29)	CIV 87-80 PHX RCB (MS)	*Terry v. Arizona*	1/20/87
30)	CIV 87-82 PHX RCB (MS)	*Beck v. Arizona*	1/20/87
31)	CIV 87-108 PHX RCB (MS)	*Kelly v. Arizona*	1/22/87
32)	CIV 87-134 PHX RCB (MS)	*Horton v. Arizona*	1/26/87
33)	CIV 87-136 PHX RCB (MS)*	*Nickens v. Arizona*	1/26/87
34)	CIV 87-137 PHX RCB (MS)	*Williams v. Arizona*	1/26/87
35)	CIV 87-138 PHX RCB (MS)	*Stolip v. Arizona*	1/26/87
36)	CIV 87-153 PHX RCB (MS)*	*Meehan v. Arizona*	1/28/87
37)	CIV 87-164 PHX RCB (MS)*	*Kaspersky v. Arizona*	1/30/87
38)	CIV 87-165 PHX RCB (MS)*	*Baker v. Arizona*	1/30/87

39) CIV 87-166	PHX RCB (MS)*	*Reffitt v. Arizona*	1/30/87
40) CIV 87-170	PHX RCB (MS)*	*Jones v. Arizona*	1/30/87
41) CIV 87-217	PHX RCB (MS)*	*Jackson v. Arizona*	2/9/87
42) CIV 87-218	PHX RCB (MS)*	*Ottman v. Arizona*	2/9/87
43) CIV 87-219	PHX RCB (MS)*	*Burrow v. Arizona*	2/9/87
44) CIV 87-220	PHX RCB (MS)*	*Henderson v. Arizona*	2/9/87
45) CIV 87-232	PHX RCB (MS)*	*Fenison v. Arizona*	2/10/87
46) CIV 87-233	PHX RCB (MS)*	*Miller v. Arizona*	2/10/87
47) CIV 87-238	PHX RCB (MS)*	*Kaczorowski v. Arizona*	2/11/87
48) CIV 87-284	PHX RCB (MS)*	*Erickson v. Arizona*	2/18/87
49) CIV 87-285	PHX RCB (MS)*	*Keith v. Arizona*	2/18/87
50) CIV 87-286	PHX RCB (MS)*	*Jones v. Arizona*	2/18/87
51) CIV 87-287	PHX RCB (MS)*	*Bailey v. Arizona*	2/18/87
52) CIV 87-302	PHX RCB (MS)*	*Gill v. Arizona*	2/20/87
53) CIV 87-303	PHX RCB (MS)*	*Bay v. Arizona*	2/20/87
54) CIV 87-304	PHX RCB (MS)*	*Howard v. Arizona*	2/20/87
55) CIV 87-305	PHX RCB (MS)*	*Kyle v. Arizona*	2/20/87
56) CIV 87-306	PHX RCB (MS)*	*Dale v. Arizona*	2/20/87
57) CIV 87-337	PHX RCB (MS)*	*Davis v. Arizona*	2/23/87
58) CIV 87-338	PHX RCB (MS)*	*Durosko v. Arizona*	2/23/87
59) CIV 87-343	PHX RCB (MS)*	*Monet v. Arizona*	2/24/87
60) CIV 87-366	PHX RCB (MS)*	*Richesin v. Arizona*	2/27/87
61) CIV 87-378	PHX RCB (MS)*	*Avila v. Arizona*	3/3/87
62) CIV 87-384	PHX RCB (MS)*	*Cameron v. Arizona*	3/5/87
63) CIV 87-400	PHX RCB (MS)*	*Mulalley v. Arizona*	3/9/87
64) CIV 87-402	PHX RCB (MS)*	*Encinas v. Arizona*	3/9/87
65) CIV 87-410	PHX RCB (MS)*	*Carpenter v. Lewis*	3/10/87
66) CIV 87-419	PHX RCB (MS)*	*Banda v. Arizona*	3/11/87
67) CIV 87-438	PHX RCB (MS)*	*Dosztal v. Arizona*	3/12/87
68) CIV 87-477	PHX RCB (MS)*	*Long v. Arizona*	3/19/87
69) CIV 87-493	PHX RCB (MS)*	*Goode v. Arizona*	3/24/87
70) CIV 87-494	PHX RCB (MS)*	*Toston v. Arizona*	3/24/87
71) CIV 87-529	PHX RCB (MS)*	*Sims v. Arizona*	3/31/87
72) CIV 87-530	PHX RCB (MS)*	*Grilz v. Arizona*	3/31/87
73) CIV 87-531	PHX RCB (MS)*	*Satterfield v. Arizona*	3/31/87
74) CIV 87-532	PHX RCB (MS)*	*White v. Arizona*	3/31/87
75) CIV 87-533	PHX RCB (MS)*	*Lee v. Arizona*	3/31/87
76) CIV 87-534	PHX RCB (MS)*	*Allen v. Arizona*	3/31/87
77) CIV 87-535	PHX RCB (MS)*	*Ridenour v. Arizona*	3/31/87
78) CIV 87-537	PHX RCB (MS)*	*Finley v. Arizona*	3/31/87
79) CIV 87-678	PHX RCB (MS)*	*Somerville v. Arizona*	4/30/87
80) CIV 87-679	PHX RCB (MS)*	*Libbey v. Arizona*	4/30/87
81) CIV 87-680	PHX RCB (MS)*	*Neault v. Arizona*	4/30/87
82) CIV 87-681	PHX RCB (MS)*	*Pearce v. Arizona*	4/30/87
83) CIV 87-682	PHX RCB (MS)*	*Maloney v. Arizona*	4/30/87
84) CIV 87-683	PHX RCB (MS)*	*Suniga v. Arizona*	4/30/87
85) CIV 87-806	PHX RCB (MS)*	*Hanson v. Arizona*	5/27/87
86) CIV 87-807	PHX RCB (MS)*	*Harmon v. Arizona*	5/27/87
87) CIV 87-808	PHX RCB (MS)*	*Endreson v. Arizona*	5/27/87
88) CIV 87-809	PHX RCB (MS)*	*Roberts v. Arizona*	5/27/87

89) CIV 87-811	PHX RCB (MS)*	*Tiery v. Arizona*	5/27/87
90) CIV 87-813	PHX RCB (MS)*	*Taylor v. Arizona*	5/27/87
91) CIV 87-814	PHX RCB (MS)*	*Baker v. Arizona*	5/27/87
92) CIV 87-815	PHX RCB (MS)*	*Robinson v. Arizona*	5/27/87
93) CIV 87-816	PHX RCB (MS)*	*McNaul v. Arizona*	5/27/87
94) CIV 87-856	PHX RCB (MS)*	*Montgomery v. Arizona*	5/29/87
95) CIV 87-857	PHX RCB (MS)*	*Barnett v. Arizona*	5/29/87
96) CIV 87-858	PHX RCB (MS)*	*Brooks v. Arizona*	5/29/87
97) CIV 87-867	PHX RCB (MS)*	*Mesa v. Arizona*	5/29/87
98) CIV 87-901	PHX RCB (MS)*	*Tapp v. Arizona*	6/8/87
99) CIV 87-902	PHX RCB (MS)*	*Williams v. Arizona*	6/8/87
100) CIV 87-903	PHX RCB (MS)*	*Vallejos v. Arizona*	6/8/87
101) CIV 87-960	PHX RCB (MS)*	*Albert v. Arizona*	6/18/87
102) CIV 87-961	PHX RCB (MS)*	*Rivera v. Arizona*	6/18/87
103) CIV 87-962	PHX RCB (MS)*	*Fimbres v. Arizona*	6/18/87
104) CIV 87-963	PHX RCB (MS)*	*Zorenes v. Arizona*	6/18/87
105) CIV 87-964	PHX RCB (MS)*	*Casey v. Arizona*	6/18/87
106) CIV 87-965	PHX RCB (MS)*	*White v. Arizona*	6/18/87
107) CIV 87-966	PHX RCB (MS)*	*Mincey v. Arizona*	6/18/87
108) CIV 87-973	PHX RCB (MS)*	*Miller v. Arizona*	6/18/87
109) CIV 87-983	PHX RCB (MS)*	*Haro v. Arizona*	6/19/87
110) CIV 87-1023	PHX RCB (MS)*	*Benitez v. Arizona*	6/29/87
111) CIV 87-1024	PHX RCB (MS)*	*Driggs v. Arizona*	6/29/87
112) CIV 87-1025	PHX RCB (MS)*	*Hernandez v. Arizona*	6/29/87
113) CIV 87-1085	PHX RCB (MS)*	*Mercado v. Arizona*	7/9/87
114) CIV 87-1087	PHX RCB (MS)*	*Litt v. Arizona*	7/9/87
115) CIV 87-1109	PHX RCB (MS)*	*Montgomery v. Arizona*	7/13/87
116) CIV 87-1111	PHX RCB (MS)*	*Garza v. Arizona*	7/13/87
117) CIV 87-1159	PHX RCB (MS)*	*Luevano v. Arizona*	7/20/87
118) CIV 87-1160	PHX RCB (MS)*	*Clark v. Arizona*	7/20/87
119) CIV 87-1331	PHX RCB (MS)*	*McGuire v. Arizona*	8/21/87
120) CIV 87-1355	PHX RCB (MS)*	*Berry v. Arizona*	8/25/87
121) CIV 87-1365	PHX RCB (MS)*	*Bills v. Arizona*	8/27/87
122) CIV 87-1366	PHX RCB (MS)*	*Morales v. Arizona*	8/27/87
123) CIV 87-1376	PHX RCB (MS)*	*Ulibarri v. Arizona*	8/28/87
124) CIV 87-1405	PHX RCB (MS)*	*Castro v. Arizona*	9/3/87
125) CIV 87-1490	PHX RCB (MS)*	*Nagele v. Arizona*	9/17/87
126) CIV 87-1492	PHX RCB (MS)*	*Wagner v. Arizona*	9/17/87
127) CIV 87-1493	PHX RCB (MS)*	*Strahm v. Arizona*	9/17/87
128) CIV 87-1494	PHX RCB (MS)*	*Lee v. Arizona*	9/17/87
129) CIV 87-1529	PHX RCB (MS)*	*Albe v. Arizona*	9/25/87
130) CIV 87-1530	PHX RCB (MS)*	*Kopp v. Arifiona*	9/25/87
131) CIV 87-1576	PHX RCB (MS)*	*Bishop v. Arizona*	10/6/87
132) CIV 87-1577	PHX RCB (MS)*	*Murbach v. Arizona*	10/6/87
133) CIV 87-1579	PHX RCB (MS)*	*Brewster v. Arizona*	10/6/87
134) CIV 87-1632	PHX RCB (MS)*	*Thornton v. Arizona*	10/15/87
135) CIV 87-1652	PHX RCB (MS)*	*Hein v. Arizona*	10/20/87
136) CIV 87-1732	PHX RCB (MS)*	*Burton v. Arizona*	10/29/87
137) CIV 87-1733	PHX RCB (MS)*	*Casper v. Arizona*	10/29/87

138) CIV 87-1734 PHX RCB (MS)*	*Cimmiyotti v. Arizona*	10/29/87
139) CIV 87-1735 PCT RCB (MS)*	*Davis v. Arizona*	10/29/87
140) CIV 87-1736 PHX RCB (MS)*	*Gunter v. Arizona*	10/29/87
141) CIV 87-1737 PHX RCB (MS)*	*Myers v. Arizona*	10/29/87
142) CIV 87-1738 PHX RCB (MS)*	*Scott v. Arizona*	10/29/87
143) CIV 87-1739 PHX RCB (MS)*	*Silva v. Arizona*	10/29/87
144) CIV 87-1740 PHX RCB (MS)*	*White v. Arizona*	10/29/87
145) CIV 87-1976 PHX RCB (MS)*	*Ashelman v. Arizona*	11/3/87
146) CIV 87-1766 PHX RCB (MS)*	*Livine v. Arizona*	11/3/87
147) CIV 87-1784 PHX RCB (MS)*	*Sells v. Arizona*	11/6/87
148) CIV 87-1802 PHX RCB (MS)*	*Glover v. Arizona*	11/12/87
149) CIV 87-1803 PHX RCB (MS)*	*Coldren v. Arizona*	11/12/87
150) CIV 87-1804 PHX RCB (MS)*	*Adams v. Arizona*	11/12/87
151) CIV 87-1805 PHX RCB (MS)*	*Evans v. Arizona*	11/12/87
152) CIV 87-1806 PHX RCB (MS)*	*Hamilton v. Arizona*	11/12/87
153) CIV 87-1807 PHX RCB (MS)*	*Fuller v. Arizona*	11/12/87
154) CIV 87-1808 PHX RCB (MS)*	*O'Mar v. Arizona*	11/12/87
155) CIV 87-1887 PHX RCB (MS)*	*Featherman v. Arizona*	11/20/87
156) CIV 87-1888 PHX RCB (MS)*	*Hill v. Arizona*	11/20/87
157) CIV 87-1889 PHX RCB (MS)*	*Turkiewicz v. Arizona*	11/20/87
158) CIV 87-1890 PHX RCB (MS)*	*Dowd v. Arizona*	11/20/87
159) CIV 87-1891 PHX RCB (MS)*	*Southerland v. Arizona*	11/20/87
160) CIV 87-1892 PHX RCB (MS)*	*Devine v. Arizona*	11/20/87
161) CIV 87-1893 PHX RCB (MS)*	*Watson v. Arizona*	11/20/87
162) CIV 87-1894 PHX RCB (MS)*	*Meyer v. Arizona*	11/20/87
163) CIV 87-1895 PHX RCB (MS)*	*Tipton v. Arizona*	11/20/87
164) CIV 87-1897 PHX RCB (MS)*	*Connover v. Arizona*	11/20/87
165) CIV 87-1898 PHX RCB (MS)*	*Scott v. Arizona*	11/20/87
166) CIV 87-1899 PHX RCB (MS)*	*Benitez v. Arizona*	11/20/87
167) CIV 87-1900 PHX RCB (MS)*	*Lee v. Arizona*	11/20/87
168) CIV 87-1956 PHX RCB(MS)*	*Rackers v. Arizona*	11/27/87
169) CIV 87-1969 PHX RCB (MS)*	*Servin v. Arizona*	11/30/87
170) CIV 87-1970 PHX RCB (MS)*	*Harris v. Arizona*	11/30/87
171) CIV 87-1971 PHX RCB (MS)*	*Sandoval v. Arizona*	11/30/87
172) CIV 87-1972 PHX RCB (MS)*	*Benford v. Arizona*	11/30/87
173) CIV 87-1973 PHX RCB (MS)*	*Olson v. Arizona*	11/30/87
174) CIV 87-1974 PHX RCB (MS)*	*Lopez v. Arizona*	11/30/87
175) CIV 87-1975 PHX RCB (MS)*	*Devereux v. Arizona*	11/30/87
176) CIV 87-1976 PHX RCB (MS)*	*Labistre v. Arizona*	11/30/87
177) CIV 87-1977 PHX RCB (MS)*	*Carter v. Arizona*	11/30/87
178) CIV 87-2016 PHX RCB (MS)*	*Myers v. Arizona*	12/4/87
179) CIV 87-2017 PHX RCB (MS)*	*Shields v. Arizona*	12/4/87
180) CIV 87-2018 PHX RCB (MS)*	*Ross v. Arizona*	12/4/87
181) CIV 87-2031 PHX RCB (MS)*	*Hall v. Arizona*	12/7/87
182) CIV 87-2032 PHX RCB (MS)*	*Carreon v. Arizona*	12/7/87
183) CIV 87-2033 PHX RCB (MS)*	*Hamblin v. Arizona*	12/7/87
184) CIV 87-2035 PHX RCB (MS)*	*Abrahame .v Arizona*	12/7/87
185) CIV 87-2050 PHX RCB (MS)*	*Martinez v. Arizona*	12/9/87
186) CIV 87-2051 PHX RCB (MS)*	*Jones v. Arizona*	12/9/87

187)	CIV 87-2052 PHX RCB (MS)*	*Wingate v. Arizona*	12/9/87
188)	CIV 87-2053 PHX RCB (MS)*	*Browder v. Arizona*	12/9/87
189)	CIV 87-2054 PHX RCB (MS)*	*Amey v. Arizona*	12/9/87
190)	CIV 87-2060 PHX RCB (MS)*	*Cummings v. Arizona*	12/10/87
191)	CIV 87-2061 PHX RCB (MS)*	*Strine v. Arizona*	12/10/87
192)	CIV 87-2062 PHX RCB (MS)*	*Estrada v. Arizona*	12/10/87
193)	CIV 87-2063 PHX RCB (MS)*	*Sawyer v. Arizona*	12/10/87
194)	CIV 87-2107 PHX RCB (MS)*	*Despain v. Arizona*	12/13/87
195)	CIV 87-2116 PHX RCB (MS)*	*Flores v. Arizona*	12/22/87
196)	CIV 87-2117 PHX RCB (MS)*	*Shinn v. Arizona*	12/22/87
197)	CIV 87-2118 PHX RCB (MS)*	*Shore v. Arizona*	12/22/87
198)	CIV 87-2119 PHX RCB (MS)*	*Schumacher v. Arizona*	12/22/87
199)	CIV 87-2120 PHX RCB (MS)*	*Branch v. Arizona*	12/22/87
200)	CIV 87-2121 PHX RCB (MS)*	*Clark v. Arizona*	12/22/87
201)	CIV 87-2140 PHX RCB (MS)*	*Thompson v. Arizona*	12/23/87
202)	CIV 87-2141 PHX RCB (MS)*	*Brandon v. Arizona*	12/23/87
203)	CIV 87-2142 PHX RCB (MS)*	*Lee v. Arizona*	12/23/87
204)	CIV 87-2143 PHX RCB (MS)*	*Lardner v. Arizona*	12/23/87
205)	CIV 87-2144 PHX RCB (MS)*	*Yoder v. Arizona*	12/23/87
206)	CIV 87-2145 PHX RCB (MS)*	*Wiley v. Arizoan*	12/23/87
207)	CIV 87-2161 PHX RCB (MS)*	*Macias v. Arizona*	12/29/87
208)	CIV 87-2162 PHX RCB (MS)*	*Polzin v. Arizona*	12/29/87
209)	CIV 87-2261 PHX RCB (MS)*	*Reischmann v. Arizona*	12/31/87
210)	CIV 88-46 PHX RCB (MS)*	*Urbanec v. Arizona*	1/12/88
211)	CIV 88-47 PHX RCB (MS)*	*Peeler v. Arizona*	1/12/88
212)	CIV 88-48 PHX RCB (MS)*	*Moreno v. Arizona*	1/12/88
213)	CIV 88-49 PHX RCB (MS)*	*Migura v. Arizona*	1/12/88
214)	CIV 88-50 PHX RCB (MS)*	*Hunt v. Arizona*	1/12/88
215)	CIV 88-51 PHX RCB (MS)*	*Wehrhan v. Arizona*	1/12/88
216)	CIV 88-59 PHX RCB (MS)*	*Logan v. Arizona*	1/14/88
217)	CIV 88-50 PHX RCB (MS)*	*Gamez v. Arizona*	1/14/88
218)	CIV 88-61 PHX RCB (MS)*	*Miller v. Arizona*	1/14/88
219)	CIV 88-62 PHX RCB (MS)*	*Mann v. Arizona*	1/14/88
220)	CIV 88-63 PHX RCB (MS)*	*Zuck v. Arizona*	1/14/88
221)	CIV 88-64 PHX RCB (MS)*	*Miniefield v. Arizona*	1/14/88
222)	CIV 88-222 PHX RCB (MS)*	*Howard v. Arizona*	2/10/88
223)	CIV 88-223 PHX RCB (MS)*	*Anton v. Arizona*	2/10/88
224)	CIV 88-247 PHX RCB (MS)*	*Perez v. Arizona*	2/12/88
225)	CIV 88-248 PHX RCB (MS)*	*Daigle v. Arizona*	2/12/88
226)	CIV 88-295 PHX RCB (MS)*	*McGlothlin v. Arizona*	2/22/88
227)	CIV 88-318 PHX RCB (MS)*	*Dominguez v. Arizona*	2/25/88
228)	CIV 88-319 PHX RCB (MS)*	*Wilson v. Arizona*	2/25/88
229)	CIV 88-398 PHX RCB (MS)*	*Allen v. Arizona*	3/11/88
230)	CIV 88-399 PHX RCB (MS)*	*Valandingham v. Arizona*	3/11/88
231)	CIV 88-443 PHX RCB (MS)*	*Gaffney v. Arizona*	3/17/88
232)	CIV 88-444 PHX RCB (MS)*	*Clayton v. Arizona*	3/17/88
233)	CIV 88-459 PHX RCB (MS)*	*Dunham v. Arizona*	3/22/88
234)	CIV 88-488 PHX RCB (MS)*	*King v. Arizona*	3/25/88
235)	CIV 88-489 PHX RCB (MS)*	*Barraza v. Arizona*	3/25/88
236)	CIV 88-490 PHX RCB (MS)*	*Rigsby v. Arizona*	3/25/88

237) CIV 88-491	PHX RCB (MS)*	*Rigsby v. Arizona*	3/25/88
238) CIV 88-492	PHX RCB (MS)*	*Nisius v. Arizona*	3/25/88
239) CIV 88-493	PHX RCB (MS)*	*D'Ambrosio v. Arizona*	3/25/88
240) CIV 88-494	PHX RCB (MS)*	*Locklin v. Arizona*	3/25/88
241) CIV 88-527	PHX RCB (MS)*	*Dugan v. Arizona*	4/4/88
242) CIV 88-528	PHX RCB (MS)*	*Lundeen v. Arizona*	4/4/88
243) CIV 88-529	PHX RCB (MS)*	*Millen v. Arizona*	4/4/88
244) CIV 88-607	PHX RCB (MS)*	*Rattler v. Arizona*	4/18/88
245) CIV 88-608	PHX RCB (MS)*	*Wheeler v. Arizona*	4/18/88
246) CIV 88-609	PHX RCB (MS)*	*Fobes v. Arizona*	4/18/88
247) CIV 88-626	PHX RCB (MS)*	*Smith v. Arizona*	4/20/88
248) CIV 88-634	PHX RCB (MS)*	*Summitt v. Arizona*	4/22/88
249) CIV 88-635	PHX RCB (MS)*	*Bell v. Arizona*	4/22/88
250) CIV 88-636	PHX RCB (MS)*	*White v. Arizona*	4/22/88
251) CIV 88-637	PHX RCB (MS)*	*Bruers v. Arizona*	4/22/88
252) CIV 88-683	PHX RCB (MS)*	*Sisco v. Arizona*	4/28/88
253) CIV 88-584	PHX RCB (MS)*	*Bigham v. Arizona*	4/28/88
254) CIV 88-685	PHX RCB (MS)*	*Just v. Arizona*	4/28/88
255) CIV 88-686	PHX RCB (MS)*	*English v. Arizona*	4/28/88
256) CIV 88-687	PHX RCB (MS)*	*Yarbrough v. Arizona*	4/28/88
257) CIV 88-727	PHX RCB (MS)*	*Taft v. Arizona*	5/6/88
258) CIV 88-728	PHX RCB (MS)*	*Fisher v. Arizona*	5/6/88
259) CIV 88-729	PHX RCB (MS)*	*Burgess v. Arizona*	5/6/88
260) CIV 88-799	PHX RCB (MS)*	*Williams v. Arizona*	5/6/88
261) CIV 88-852	PHX RCB (MS)*	*Wright v. Arizona*	5/31/88
262) CIV 88-863	PHX RCB (MS)*	*Robertson v. Arizona*	5/31/88
263) CIV 88-864	PHX RCB (MS)*	*Brent v. Arizona*	5/31/88
264) CIV 88-983	PHX RCB (MS)*	*Crain v. Arizona*	6/20/88
265) CIV 88-1079	PHX RCB (MS)*	*Rozboril v. Arizona*	7/1/88
266) CIV 88-1080	PHX RCB (MS)*	*Dale v. Arizona*	7/1/88
267) CIV 88-1081	PHX RCB (MS)*	*Burch v. Arizona*	7/1/88
268) CIV 88-1122	PHX RCB (MS)*	*Naftel v. Arizona*	7/11/88
269) CIV 88-1123	PHX RCB (MS)*	*Henderson v. Arizona*	7/11/88
270) CIV 88-1124	PHX RCB (MS)*	*Nirschel v. Arizona*	7/11/88
271) CIV 88-1264	PHX RCB (MS)*	*Crew v. Arizona*	8/5/88
272) CIV 88-1388	PHX RCB (MS)*	*Poston v. Arizona*	5/25/88
273) CIV 88-1388	PHX RCB (MS)*	*Stevens v. Arizona*	8/25/88
274) CIV 88-1390	PHX RCB (MS)*	*Dibella v. Arizona*	8/25/88
275) CIV 88-1447	PHX RCB (MS)*	*Eddy v. Arizona*	9/7/88
276) CIV 88-1450	PHX RCB (MS)*	*Marquez v. Arizona*	9/8/88
277) CIV 88-1461	PHX RCB (MS)*	*Smith v. Arizona*	9/8/88
278) CIV 88-1462	PHX RCB (MS)*	*Weigel v. Arizona*	9/8/88
279) CIV 88-1463	PHX RCB (MS)*	*Garcia v. Arizona*	9/8/88
280) CIV 88-1464	PHX RCB (MS)*	*Irving v. Arizona*	9/8/88
281) CIV 88-1480	PHX RCB (MS)*	*Minier v. Arizona*	9/12/88
282) CIV 88-1498	PHX RCB (MS)*	*Fortier v. Arizona*	9/14/88
283) CIV 88-1499	PHX RCB (MS)*	*Herrera v. Arizona*	9/14/88
284) CIV 88-1500	PHX RCB (MS)*	*Sanchez v. Arizona*	9/14/88
285) CIV 88-1501	PHX RCB (MS)*	*Bartol v. Arizona*	9/14/88

286) CIV 88-1502 PHX RCB (MS)*	*Anderson v. Arizona*	9/14/88
287) CIV 88-1503 PHX RCB (MS)*	*Muldrew v. Arizona*	9/14/88
288) CIV 88-1504 PHX RCB (MS)*	*Preayer v. Arizona*	9/14/88
289) CIV 88-1556 PHX RCB (MS)*	*Ternandez v. Arizona*	9/27/88
290) CIV 88-1557 PHX RCB (MS)*	*Harmon v. Arizona*	9/27/88
291) CIV 88-1558 PHX RCB (MS)*	*Baker v. Arizona*	9/27/88
292) CIV 88-1559 PHX RCB (MS)*	*Thomas v. Arizona*	9/27/88
293) CIV 88-1560 PHX RCB (MS)*	*Kelly v. Arizona*	9/27/88
294) CIV 88-1593 PHX RCB (MS)*	*Byrd v. Arizona*	10/3/88
295) CIV 88-1594 PHX RCB (MS)*	*Landeros v. Arizona*	10/3/88
296) CIV 88-1595 PHX RCB (MS)*	*Sorrell v. Arizona*	10/3/88

IT IS SO ORDERED.

DATED this 28th day of November, 1988.

/s/ Robert C. Broomfield
United States District Judge

(3)

No. 93-353

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

FELTON HALE AND RICHARD S. BERRY,

Petitioners,

v.

STATE OF ARIZONA, et al.,

Respondents.

and

JOHN LEROY FULLER, et al.,

Petitioners,

v.

STATE OF ARIZONA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii, iii

REASONS FOR DENYING THE PETITION..... 1

1. There is no Square Inter-Circuit Conflict 1

2. The Department of Labor's Interpretation is Not Inconsistent With the Opinion Below 3

3. The Opinion Below Does Not Do Violence to FLSA's Central Aims..... 5

4. The Implication That Arizona Inmates Employed by Best Western International Were Not Paid the Minimum Wage is Untrue..... 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984) 1, 2, 4

Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993) Pet. for Cert. filed (No. 92-5298) 1, 2

Powell v. United States Cartridge Co., 339 U.S. 497 (1950) 3

Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1303 (1993) 2, 5

Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990) 1, 2

STATUTES

18 U.S.C. § 1761 2

18 U.S.C. § 1761(a) 2

18 U.S.C. § 1761(c) (1992) 3, 5

29 U.S.C. §§ 201 et seq. 1

MISCELLANEOUS

Arizona Revised Statutes

§ 31-333 2

§ 31-233C 2

§ 31-254A 5, 8

§ 41-1624.01 5

TABLE OF AUTHORITIES – Continued

Page

Work in American Prisons, The Private Sector Gets Involved, U.S. Dept. of Justice, National Institute of Justice May 1988, at 27-28 ..... 5, 7, 8

Burger, Warren E., *More Franchises, or Factories With Fences*, New England Journal of Prison Law Vol. 8, No. 1, Winter, 1982, pp. 111-20 6

Burger, Warren E., *The Need for Changes in Prisons and the Correctional System*, Arkansas Law Review, Vol. 38, 1985, pp. 711-26 6

REASONS FOR DENYING THE PETITION

1. There is no Square Inter-circuit Conflict.

Petitioners argued that the opinion below raises an inter-circuit conflict with the Second and Fifth Circuit's decisions in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984) and *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). A close reading of these two cases discloses no square conflict. Both *Carter* and *Watson* involved prison inmates who worked for outside employers; the teaching for a community college in *Carter* and working for a private contractor in *Watson*. Thus the inmates in *Carter* and *Watson* did not work for the prison itself nor a state entity such as ARCOR. The court in *Carter* concluded that Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* may apply to the plaintiff vis-a-vis the outside employer, Dutchess Community College, and remanded the case for a factual finding. In *Watson*, the court concluded that the private contractor was an employer of prisoners not sentenced to hard labor and were on work release. The opinion below took pains not to create a conflict with *Carter* and *Watson*. 993 F.2d 1387, 1393 (9th Cir. 1993). (Pet. App. 12a.) The Court emphasized that this case concerned "inmates working for a prison, in a program structured by the prison pursuant to a state law requiring prisoners to work at hard labor . . . ". *Id.*[1]

Clearly, there is a great difference between prisoners working for outside employers and prisoners who work

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[1] *See also Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993) *Petition for cert. filed* (No. 92-5298).

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[1] *See also Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993) *Petition for cert. filed* (No. 92-5298).

for prison industries within the fabric of a state prison system.

Most importantly, neither *Carter* or *Watson* mentioned or discussed the Ashurst-Sumner Act, 18 U.S.C. § 1761. That Act prohibits the transportation of prison-made goods in interstate commerce, with a number of exceptions. When that Act is put in the equation:

> [I]t is difficult to imagine that Congress would have enacted Legislation in 1938 that rendered its recently passed prison-made goods law essentially superfluous (for the FLSA, so construed, would have addressed the problem of unfair competition from cheaply made goods by eliminating the low-labor-cost advantage.)

993 F.2d at 1397, Pet. App. at 21a, quoting *Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1303 (1993). *See also Harker v. State Use Industries*, 990 F.2d 131, 134 (4th Cir. 1993). *Petition for cert. filed* (No. 92-5298).

In the interpretation of the interaction between FLCA and the Ashurst-Sumner Act, all three circuits (4th, 7th and 9th) which have passed on this issue are in agreement.[2]

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[2] Although consideration of the Ashurst-Sumner Act in connection with FLSA would have improved the analytical framework in *Watson*, the result in *Watson* most likely will be the same. 18 U.S.C. § 1761(a) specifically exempts "convicts or prisoners, on parole, supervised release, or probation," from its coverage. Work release or furlough is the same as supervised release. *See e.g.* A.R.S. §§ 31-333, 31-233C.

Petitioner argued that since this Court held in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) that the Walsh Healey Act did not preclude the application of FLSA, the Ashurst-Sumner Act should be treated likewise. That comparison is flawed. In *Powell*, this Court found that although the Walsh Healey Act and FLSA overlapped, they were not mutually exclusive. *Id.* at 519. FLSA and the Ashurst-Sumner Act, however, are mutually exclusive. The Ashurst-Sumner Act criminalizes the transportation of prison-made goods in interstate commerce. That paramount purpose cannot be reconciled with the notion that Congress also intended that prisoners who made the contraband must nevertheless be paid the minimum wage so that their prison-made goods could compete fairly in interstate commerce. Moreover, the 1979 amendment to the Ashurst-Sumner Act which created pilot projects and the inmate wage requirements for those pilot projects demonstrate that Congress, in enacting the amendment, intended that these provisions govern prison-made goods and not FLSA. Justice System Improvement Act of 1979 § 827(a), 83 Stat. 1215 (1979) (codified as amended at 18 U.S.C. § 1761(c)(1992)). The court of appeals correctly observed that the Ashurst-Sumner Act is not "mutually supplementary" to FLSA. 993 F.2d at 1397-98 n.18. (Pet. App. p. 22a.)

2. The Department of Labor's Interpretation is Not Inconsistent With the Opinion Below.

Petitioners cited two letters by administrative officials in the Department of Labor for their contention that the Fourth and Ninth Circuit's rulings will result in non-

uniform application of FLSA to prisoners. The first letter (by Herbert J. Cohen) concerned a contract between an outside employer and the prison which provided the prison inmates for the work. Citing *Carter*, the letter concluded that FLSA applied to that situation. The second and more recent letter (by Darrel F. Sweeney, Jan. 21, 1993), stated:

> It is the position of the Department that a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the FLSA. Therefore, such workers are not covered by the FLSA and would not have to be paid in accordance with its monetary provisions.
>
> A different situation exists when inmates are contracted out by an institution to a private company or individual. * * *

Pet. App. at 105a.

The Cohen and Sweeney letters are not inconsistent with the decision below. The court of appeals did not hold that prisoners who were contracted out to private or outside entities are not employees of these entities. It specifically stated:

> While we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case, who worked for programs structured by prison pursuant to the state's requirement that prisoners work at hard labor, are not "employees" of the state within the meaning of FLSA.

993 F.2d at 1389, (Pet. App. at 4a).

The Cohen and Sweeney letters are consistent with Arizona law. Arizona Revised Statutes (A.R.S.) § 31-254A requires that prisoners who work for private entities under contract with the state, be paid at least the minimum wage.[3] Moreover, neither letter mentioned the Ashurst-Sumner Act. Therefore, the implication suggested by the Petitioners that the agency perceived no conflict between FLSA and the Ashurst-Sumner Act was unwarranted. The probable reason for that omission is that two of the three decisions concerning the interaction between the two statutes postdated the Sweeney letter (the most recent of the two letters). The *Vanskike* opinion, although decided in 1992, was so recent that it most likely escaped the attention of agency officials in January of 1993.

3. The Opinion Below Does Not do Violence to FLSA's Central Aims.

The Petitioners conceded that Arizona's program received a certificate of compliance under 18 U.S.C. § 1761(c), but argued that the opinion below does violence to one of FLSA's central aims because "it is undisputed that the prisoners who worked in that program were not paid the minimum wage." That assertion is off the mark. Many of Arizona inmates were paid above the minimum wage when working for private entities. *Work*

---

[3] A.R.S. § 31-254A provides that "[i]f the director [of the Department of Corrections] enters into a contract pursuant to § 41-1624.01 with a private person, firm, corporation or association the compensation shall be as prescribed by the person, firm, corporation or association but shall not be below the minimum wage.

in American Prisons, The Private Sector Gets Involved, U.S. Dept. of Justice, National Institute of Justice, May 1988, at 27-28.

By Congressional design, the important field of training and rehabilitation of prison inmates and the incidental production of goods which enter into interstate commerce, was entrusted to the Department of Justice and its Bureau of Justice Assistance.[4] The fact that some prison programs operate in violation of the Ashurst-Sumner Act does not mean that FLSA should come into play. Whether or not there is perfect compliance with the Ashurst-Sumner Act has no bearing on FLSA's non-application. Even if some of the non-complying programs were to pay FLSA's minimum wage, these programs would still be in violation of the Ashurst-Sumner Act and be subject to criminal prosecution under that Act. On the other hand, compliance with the Ashurst-Sumner Act and its prevailing wage requirement would level the playing field because prevailing wages paid would generally be more than FLSA's minimum wage.

4. The Implication That Arizona Inmates Employed by Best Western International Were Not Paid the Minimum Wage is Untrue.

Petitioners argued that "one Best Western International, Inc. reservation center staffed by Arizona inmates

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[4] The creation of prison industries was due, in part, to former Chief Justice Burger's calling for "factories with fences." Burger, Warren E. *"More franchises, or Factories With Fences,"* New England Journal of Prison Law, Vol. 8, No. 1, Winter, 1982, pp. 111-20, and Burger, Warren E. *"The Need for Changes in Prisons and the Correctional System."* Arkansas Law Review, Vol. 38, 1985, pp. 711-26.

handled 2.5 million calls, representing $72 million in room reservation sales." Petition at 19. Petitioners then stated that "Trans World Airlines reservation system operated at a California correctional facility handled approximately $1 million in airline ticket sales." The paragraph was followed immediately by the paragraph which stated: "Paying sub-minimum wages to inmate workers at prison-based businesses that offer goods and services in interstate commerce inevitably gives rise to unfair competition that is harmful to private sector business and the employees of those businesses."

These two paragraphs when read together clearly implied that the inmates who worked for Best Western international and Trans World Airlines were not paid the FLSA minimum wage. That implication is untrue. Surprisingly, the source from which Petitioners cited and obtained their information concerning both Best Western International and Trans World Airlines prison programs, *Work in American Prisons, The Private Sector Gets Involved*, stated:

> Starting salaries are the same as those for reservation agents at the main center: $4.50 per hour, with an increase of up to 12 percent after nine months. Employees at ACW [Arizona Center for Women] are subject to the same policies and procedures as all Best Western employees, including those governing disciplinary actions and job requirements. Each ACW employee, in addition to paying federal, state and social security taxes, contributes 30 percent of her net wages to offset the cost of incarceration.

Id. at 28.

Trans World Airlines' California prison employees were paid $5.67 per hour. *Id.* at 30.

The $4.50 per hour wage received by Arizona inmates was considerably more than the FLSA minimum wage of $3.35 per hour in effect throughout the 1980's. Another Arizona prison work program also paid more than the FLSA minimum wage. *Work in American Prisons. The Private Sector Gets Involved,* at 27 (Wahlers Manufacturing Company's joint project with ARCOR). Under Arizona law, A.R.S. § 31-254A, all inmates who worked for Best Western International or other private entities were paid at least the FLSA minimum wage.

It is unfortunate that the Best Western International's program had been singled out by the Petitioners. That program was hailed by the Department of Justice as "one of the most positive illustrations of the potential of private sector employments of inmates." *Work in American Prisons, The Private Sector Gets Involved,* at 28.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 93-353

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF AUTHORITIES

CASES

	Page
Carter v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984)	1, 2
Gilbreath v. *Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991)	3
Miller v. *Dukakis*, 961 F.2d 7 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992)	5
Watson v. *Graves*, 909 F.2d 1549 (5th Cir. 1990)	1, 2, 5

STATUTES

18 U.S.C. § 1761	6

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---

REPLY BRIEF OF PETITIONERS

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1. Respondents suggest that the decision below does not conflict with the decision of the Second Circuit in *Carter* v. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), or with the decision of the Fifth Circuit in *Watson* v. *Graves*, 909 F.2d 1549 (5th Cir. 1990), because a "close reading" reveals certain factual discrepancies between these two cases and the ruling below. Opp. at 1. The discrepancies respondents identify, however, are entirely irrelevant to the doctrinal division the decision below creates.

a. The central factual distinction upon which respondents rely is that the prisoners in *Carter* and *Watson* worked outside the prison for outside contractors. Opp. at 1-2. In *Carter* and *Watson*, however, the analysis of the courts did not turn on where the inmates worked or on the private public status of the alleged employer. Instead, these courts "look[ed] to the purposes behind the [FLSA]." *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 13. Noting that one of these purposes is "to eliminate unfair competition," the courts reasoned that "status as an inmate does not foreclose inquiry into FLSA coverage" because goods and services produced with under-priced inmate labor can have unfair competitive effects. *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 13. The courts therefore held that, "in order to determine the true 'economic reality' of the Inmates' employee status, we must apply the four factors of the economic realities test to the facts in the instant case in light of the policies behind FLSA." *Watson*, 909 F.2d at 1554; see also *Carter*, 735 F.2d at 14 ("[a] full inquiry into the true economic reality is necessary").

Whatever "pains" the Ninth Circuit took below "not to create at conflict" (Opp. at 1), its decision cannot be reconciled with *Carter* and *Watson*. While the Second and Fifth Circuits expressly held that the economic realities test must be applied to determine the employee status of inmates, the Ninth Circuit joined the Seventh Circuit in holding that the test is "not a useful framework in the case of prisoners who work for a prison-structured program." Pet. App. at 14a. And where the Second and Fifth Circuits found Congress' desire to eliminate unfair competition central to determining the applicability of the FLSA to inmates, the Ninth Circuit expressly rejected this rationale. Instead, it stated that (Pet. App. at 20a):

> while the fact that prison-made goods are sold in interstate commerce implicates congressional concern with unfair competition, nothing in the FLSA indi-

cates that that fact alone should convert the relationship between prison and prisoner to one of employer-employee such that prisoners working on a program structured by the prison are entitled to a minimum wage.

Not only is the factual distinction respondents draw irrelevant to the rationale of *Carter* and *Watson*, it lacks any basis in the FLSA itself. Respondents assert that "there is a great difference between prisoners working for outside employers and prisoners who work for prison industries within the fabric of a state prison system." Opp. at 1-2. But they point to nothing in the language, structure, purpose, or history of the Act that indicates that this "great difference" has any bearing on the proper application of the Act.

As petitioners demonstrated, the Act's operative provisions are strikingly broad and do not distinguish between prisons and other types of employers, or between inmates who work in "prison structured programs" and other employees engaged in interstate commerce. Pet. at 16. Moreover, as the Second and Fifth Circuits have recognized, one of the Act's central aims—preventing unfair competition—is directly affected by goods that are produced with cheap inmate labor and sold in interstate commerce. Indeed, while respondents go out of their way to point out that Arizona inmates who staffed reservation centers for Best Western International and Trans World Airlines were paid the minimum wage (Opp. at 6-8), this fact simply highlights the irrationality of the lines the State has drawn. A host of ARCOR programs affect interstate commerce, yet the payment of minimum wages to the prisoners who work in these programs turns on the economically meaningless fortuity of whether the employer is the prison (or, as in the case of the IOBE program, a fellow prisoner) or a third party.[1]

[1] In fact, while the State now champions this distinction, it took precisely the opposite position two years ago in *Gilbreath* v. *Cutter*

b. Respondents also argue that the decision below creates no conflict because neither the Second nor Fifth Circuit discussed the impact of the Ashurst-Sumners Act. Opp. at 2. Rather than undermine the existence of a division among the circuits, however, this fact confirms its existence: while two circuits have concluded that the FLSA applies to inmates who produce goods or supply services in interstate commerce because the FLSA was enacted to prevent unfair competition, three others have concluded that this congressional concern with unfair competition is irrelevant and that the FLSA is therefore inapplicable. Respondents' implicit suggestion that the Second and Fifth Circuits would reverse themselves if they now explicitly considered the impact of a statute that was extant when they rendered their decisions is entirely unwarranted and provides no basis for denying review.

Moreover, respondents' suggestion rests on the manifestly incorrect assertion that applying the FLSA to prisoners who produce goods in interstate commerce "cannot be reconciled" with the "paramount purpose" of Ashurst-Sumners. Opp. at 3. As petitioners and the dissenters below have demonstrated, the two laws are not mutually exclusive but supplementary. Pet. at 17-18; Pet. App. at 36a-39a. Indeed, respondents' contention that Ashurst-Sumners precludes application of the FLSA to inmates in ARCOR programs is astonishing in light of respondents' tacit admission that at least some of those programs violate Ashurst-Sumners.[2] That admission completely belies

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Biological, Inc., 931 F.2d 1320 (9th Cir. 1991), where it argued that inmates working for an outside contractor were not employees because they worked within the prison walls.

[2] After noting that Arizona received a certificate of compliance under 18 U.S.C. § 1761(c), respondents state that "[m]any of Arizona['s] inmates were paid above the minimum wage *when working for private entities.*" Opp. at 5 (emphasis added). The clear implication of this carefully phrased statement is that at least some inmates working for private entities are not paid mini-

the Ninth Circuit's suggestion that "Congress's concern with unfair competition in the FLSA will not be subverted by declining to apply its minimum wage standards to convict labor in prison-structured programs." Pet. App. at 22a. That congressional goal has been and is continuing to be subverted by the introduction into interstate commerce of ARCOR goods and services produced by unfairly priced prison labor.[3]

In short, the distinctions respondents attempt to draw in no way detract from the existence of a circuit split, but rather highlight the need for doctrinal consistency and uniform application of the FLSA.[4]

2. Respondents also argue that the decision below does not conflict with the Department of Labor's interpretation

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mum wage. In any event, respondents cannot deny that petitioners were not paid minimum wages for work performed in prison industries that produced goods and services sold in interstate commerce.

[3] Respondents attempt to confuse matters by noting that payment of minimum wages to petitioners would not necessarily cure the State's violation of Ashurst-Sumners. Opp. at 6. But that fact is irrelevant to whether the existence of Ashurst-Sumners obviates the FLSA's concern with unfair competition.

[4] Respondents also note that the inmates in *Watson* had not been sentenced to hard labor and were instead on work release. Opp. at 1. But the Fifth Circuit's observation that "when a prisoner is sentenced to labor as part of his sentence, his labor belongs to the prison and is at the disposal of the prison officials" (*Watson*, 909 F.2d at 1553 n.7), is simply an acknowledgement that, as petitioners have always recognized, work performed in and for the prison that does not affect interstate commerce falls outside the purview of the FLSA. Pet. at 3; *see also Miller* v. *Dukakis*, 961 F.2d 7, 9 (1st Cir.), *cert. denied*, 113 S. Ct. 666 (1992) (inmate employees of prison treatment center not covered "because the Treatment Center does not operate in the marketplace and has no business competitors"). Nowhere did the Fifth Circuit suggest that inmates sentenced to hard labor could never be employees under the Act. In any event, this distinction does not apply to *Carter* and thus does not eliminate the circuit split.

of the FLSA because, like the decisions in *Carter* and *Watson*, the interpretive letters petitioners cite involved inmates who worked for outside contractors. Opp. at 3-5. Again, however, this distinction is irrelevant. Seizing on the fact that petitioners work in prison structured programs pursuant to sentences of hard labor, the Ninth Circuit dispensed altogether with the economic realities test and deemed Congress' concern with unfair competition irrelevant to determining whether inmates are employees under the FLSA. Pet. App. at 15a. By contrast, as the letter of Herbert J. Cohen explains, the Department of Labor believes that, in the case of inmates as with other workers, "the determination of an employment relationship is not based on isolated factors or any *single characteristic*" but instead "depends upon the circumstances of the whole activity," which must be assessed under the "*Bonnette*" or "economic reality test." Pet. App. at 102a (emphasis added; internal quotation marks deleted). Such an examination is required, the Department has explained, to ensure that the FLSA's goal of preventing unfair competition is not frustrated. Pet. App. at 103a. The Department's analysis, which is fundamentally inconsistent with that of the Ninth Circuit, plainly does not hinge on the isolated fact upon which respondents once again choose to focus.

Moreover, as petitioners have demonstrated, the Department of Labor's letters indicate that, again in contrast to the Ninth Circuit, the Department perceives no conflict between the FLSA and Ashurst-Sumners. Pet. at 15. Respondents' suggestion that "the probable reason" for this apparent agency view is that "two of the three decisions concerning the interaction between the two statutes postdated" the letters in question (Opp. at 5) is entirely untenable. The Department is responsible for enforcing both laws. Certainly, it does not look to the decisions of the courts of appeals to be reminded of the statutes it is charged with administering. See 18 U.S.C. § 1761 (re-

quiring Secretary of Labor to submit annual reports to Congress concerning compliance with Ashurst-Sumners Act).

* * * *

Respondents cannot explain away the inter-circuit conflict or interpretive conflict between the judicial and Executive branches concerning the applicability of the FLSA to inmates who produce goods and services in interstate commerce. Nor can respondents refute petitioners' showing that the decision below undermines fair competition—one of the Act's central goals. Accordingly, this case raises an important question of federal law that can and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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